No. 34014-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

The person identified by the prosecution in this Persistent Offender case as

ROBERT EDWARD LEWIS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Frederick W. Fleming,
The Honorable Stephanie Arend and
The Honorable Vicki Hogan, Judges

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

U.S. SUPREME COURT

OTHER FEDERAL CASELAW

CONSTITUTIONAL PROVISIONS

RULES AND STATUTES

OTHER SOURCES

A. ASSIGNMENTS OF ERROR

1. The court erred in finding appellant competent to stand trial when the state had failed to comply with RCW 10.77.090(1)(c) and that failure prevented a proper determination of competency. Appellant assigns error to competency conclusions of law 2 and 3. See CP 60-62.

2. Appellant assigns error to competency finding of fact 19, which provides:

> Defendant's I.Q. is reasonably estimated by doctors Hart, Waiblinger and Gollogly to be in the high 70's or low 80's. Defendant has below average intelligence. Defendant is not mentally retarded.

CP 61.

3. The prosecutor committed flagrant, prejudicial misconduct.

4. Appellant's state and federal constitutional rights to present a defense were violated.

5. Appellant did not receive effective assistance of counsel.

6. Cumulative trial error deprived appellant of his state and federal constitutional due process rights to a fair trial under the 5th, 6th and 14th Amendments and Article I,§§ 3, 22.

7. The court erred in entering a sentence of life without the possibility of parole under the Persistent Offender Accountability Act (POAA) based upon prior convictions which were constitutionally invalid on their face.

8. Appellant's state and federal constitutional rights to trial by jury and proof beyond a reasonable doubt as described in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004),

were violated when the court made factual findings about identity at sentencing and relied on those findings in increasing the sentence from that which was authorized by the jury's verdict.

9. The "prior conviction" exception to the rights to trial by jury and proof beyond a reasonable doubt is no longer valid and appellant was entitled to have the existence of his prior convictions proven to a jury beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 10.77.090(1)(c) mandates that a defendant found incompetent who is subsequently committed for 90 days of "competency restoration" must be evaluated for developmental disability. Is reversal required where there was no such evaluation done and appellant could well be developmentally disabled? Further, did the court err in relying on the opinion of a state's witness that appellant was not so disabled when that witness admitted he conducted no evaluations of appellant for developmental disability, had no expertise in that area, and did not even conduct an I.Q. test, a necessary prerequisite to determining developmental disability under the relevant statutes?

2. Did the prosecutor commit flagrant, prejudicial misconduct in telling the jury that it could only acquit appellant if it found that the prosecution's main witness, the elderly mother of the victim, was lying? Further, was counsel ineffective in failing to object and request a curative instruction?

3. Were appellant's rights to present a defense violated when the trial court refused to allow him to present evidence that the level of

methamphetamine in the victim's bloodstream would be likely to make a person aggressive where appellant's defense was that the shooting was accidental and the gun had discharged while after the victim had charged him aggressively and the prosecution was claiming the victim would not have charged but was simply shot down while standing?

4. Does cumulative error compel reversal where the errors all went to the heart of the state's case and the jury's ability to fairly determine whether the shooting was accidental or intentional?

5. Were appellant's state and federal rights to have any fact which increases his sentence beyond that authorized by the jury's verdict, as described in Blakely, violated when the sentencing court heard testimony, reviewed evidence and made factual findings about whether appellant was the same person as someone who had been convicted of two prior "strike" crimes and relied on those findings in sentencing him to life in prison without the possibility of parole?

6. Appellant was sentenced to life in prison without the possibility of parole under the POAA, based upon the existence of two prior convictions for "strike" crimes. Those convictions were based upon pleas entered in 1994 and 1995, after the POAA was passed. Did the court err in relying on those prior convictions where the plea agreements did not inform appellant that he was pleading to strike crimes and appellant did not admit guilt but instead entered Alford[1] pleas?

7. Were appellant's rights as described in Blakely violated

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[1]North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

where the prior convictions the prosecution claimed were his were not proven to a jury by a reasonable doubt and where the "prior conviction" exception which has been interpreted as allowing a sentencing court to make findings about such convictions and apply only a preponderance standard no longer retains currency?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant, the person identified by the prosecution in this case as Robert E. Lewis,[2] was charged with First-Degree Murder and a firearm enhancement. CP 5; RCW 9.94A.125, RCW 9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.530, RCW 9.94A.602, RCW 9A.32.030(1)(a). A competency hearing was held before the Honorable Frederick Fleming on December 1, 6-9, 2004, and after a motion before the Honorable Vicki Hogan, trial was held before the Honorable Stephanie Arend on September 26-29 and October 3-4, 2005.[3] The jury found Mr. Lewis guilty of second degree murder as a lesser included offense and of committing the crime while armed with a firearm. CP 169-172.

2. Overview of relevant facts[4]

On the afternoon of July 23, 2002, Brett Holdorph was shot at his home and ultimately died. RP 61-63, 164. According to his mother,

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[2]Because this case involved a POAA sentence, the prosecution was required to prove identity. Appellant will refers to himself as "Robert Lewis" herein only for the purposes of arguing the appeal and expressly reserves the right to challenge his identity as that person in any future proceedings.

[3]Reference to the verbatim report of proceedings is explained in an Appendix hereto.

[4]More detailed discussion of the facts relevant to each issue is contained in the argument section, *infra*.

Francis Holdorph, her 30+ year old son was in his room, sleeping, when there was a knock on the door. RP 68-69. She opened the door and the man outside asked if her son was there. RP 164-70. When she told said her son was there but was sleeping, the man forced his way in, grabbed her by the hair and told her to get her son. RP 68-69, 164-76. She started fighting the man, trying to get loose, and called out for her son. RP 171-73. Brett came into the hallway wearing only a towel and Mrs. Holdorph saw a small black or "blued" gun in the man's hand next to her head, then heard a loud bang and saw her son fall down. RP 171-73. The man then ran out the door and Mrs. Holdorph called police. RP 90, 207-212.

Mr. Holdorph was moved by firefighters when they arrived to provide medical assistance. RP 78-80. It was not clear if anything else was moved. RP 110-11. Several state witnesses testified that there was blood not only in the hallway but also in the living room and that they could not determine where, exactly, Mr. Holdorph was when he was shot. RP 116, 126-28.

Mrs. Holdorph estimated that her son was 7-10 feet away from her when the shot was fired. RP 204. Later forensic testing by a state's expert indicated that Mr. Holdorph was actually shot from no further away than 18 inches to 2 feet. RP 230-39.

Mrs. Holdorph also testified that her son never had any physical contact with the person who shot him and neither she nor her son struggled with the man to try to get the gun. RP 173-81. She said she was right next to the man and had her hand up by her hair trying to get loose when the gun went off, and she got stippling on her left hand and the side of her face

as a result. RP 182-83. A state expert testified that in order to get such stippling, a person must be in front of, not next to, the muzzle of the gun. RP 278.

Mr. Holdorph had a gunshot wound to his upper chest on the left side, as well as a minor bruise on his nose and a scratch at the back of his left second finger. RP 234-35. He had methamphetamine, amphetamine, nicotine, caffeine, and marijuana in his body, and the level of methamphetamine was high. RP 240-54. Photos of his body indicated that there was "something which interrupted this stippling pattern when the gunshot was fired," and a state's expert testified that it was possible Mrs. Holdorph's hand could have been that object. RP 275-80.

Mrs. Holdorph told police that the man who had shot her son was Samoan with a red shirt, short hair, no facial hair and blue jeans. RP 70-73, 438. A neighbor told police she had seen a dark purple car come up to the house, heard a knock on the door, then heard a bang and looked over to see someone wearing a bright red top get into the car. RP 301-303. Her granddaughter, who was about 11 at the time, said she remembered hearing a car drive up really fast, hearing a knock on the door, and seeing "like a purple convertible." RP 323-26. She also said she saw a guy standing on the front porch when she heard the knock. RP 326. He had "blackish" or dark hair and seemed a little taller than her, and a "little bit heavier." RP 327. She did not remember if she saw the person go inside, and did not know how much time passed specifically but said it was "[j]ust a little bit" between the knock and the bang. RP 328. When the person came out she saw through the trees obstructing her view a "really quick

flash of red" so she thought they were wearing a red jacket. RP 329. She also thought she had seen that purple car before a week or a few days before at the Holdorph house and that a man with black, long hair tied in a ponytail got out of the car that day and started yelling at Mr. Holdorph. RP 331-34.

The car she saw did not have a dark top but rather a white or "tan-ish" top with a fin on the back. RP 331. Another neighbor who was sitting on her porch that afternoon and thought she had heard a firecracker described seeing a deep purple car with a black top drive by three times before hearing the sound. RP 309-15.

Ruby Weishaar, a friend of Mr. Holdorph's, testified that he sold methamphetamine in quantities up to about a gram. RP 282-93. She was with him all night the night before the shooting and said that, at about 4:30 or 5 in the morning, he got a phone call and it seemed there was a problem with some dope he had sold. RP 283-86. She heard Mr. Holdorph say he would take care of it for the person. RP 283-86. She also said she heard him saying something like, "he better not come here and start any trouble." RP 287-88. She asked Mr. Holdorph what was happening, and he told her some girl named Tabatha had gotten some dope from him and her boyfriend, Frank was mad about something relating to the deal. RP 287-88. Tabatha was a nude dancer and Frank was known to be a "hot head" and a bully. RP 287-94. Mr. Holdorph said if Frank came over, Mr. Holdorph would deal with it. RP 294.

Mrs. Holdorph said she did not know her son was a dealer but admitted she suspected her son had been using drugs and that she had

sometimes smelled a "strange smell" which he claimed was just burning plastic in the house. RP 135-36, 160, 204-205. She had told her son repeatedly he was not allowed to use drugs in her house. RP 135-36, 160, 204-205.

Frank Hieber claimed that he had only met Mr. Holdorph twice and there would be "absolutely no reason" for Mr. Holdorph to think he was a bully or be afraid of him at all. RP 389-90. According to Mr. Hieber, he drove a purple car that day to the Holdorph house with Robert Lewis, someone he had known for a long time and considered "kind of like" a "brother." RP 339-42. Mr. Hieber was living with his girlfriend Tabatha Casterline, a nude dancer, and her children, and she and Mr. Hieber used methamphetamine together which they got from many sources, including Mr. Holdorph. RP 343-44. Mr. Hieber and Ms. Casterline had bought small quantities of the drug from Mr. Holdorph at his home, including once about a week before the incident. RP 344.

According to Mr. Hieber, on the day of the incident, Mr. Lewis came by the house and asked him to drive his car out to his brother's house. RP 346. While Mr. Lewis was there, Ms. Casterline had telephoned Mr. Holdorph and told him that she felt he had shorted her in their most recent drug transaction. RP 346-48. Mr. Hieber claimed that Mr. Lewis asked if it was the same Brett who lived out in Graham, and that Mr. Lewis said Brett owed him some money so he would be willing to go get money or drugs from Mr. Holdorph on Ms. Casterline's behalf. RP 349. Mr. Hieber said Mr. Smith's tone and demeanor was just "volunteering" to go "pick it up" but was not like "let's go get him" or

anything of that nature. RP 349.

Mr. Hieber testified that, ultimately, the conversation ended with Ms. Casterline saying she was going to handle it herself. RP 348. A moment later, he said that it was essentially decided that they would stop at Mr. Holdorph's home on the way to Mr. Lewis' brother's house. RP 349.

The men got into Mr. Lewis' car, a purple mustang GT convertible with a "spoiler" on the back. RP 355-56. Mr. Hieber said they made a stop or two, driving by the Holdorph residence to get to Mr. Lewis' brother's house and driving back to the Holdorph's when Mr. Lewis' brother was not home. RP 357. Mr. Hieber said that Mr. Lewis was just going to go into the Holdorph home and get the money or what was owed. RP 358. Mr. Hieber claimed he did not have a weapon and, to his knowledge, neither did Mr. Lewis. RP 358-59.

Mr. Hieber stayed in the car, listening to the stereo "[p]retty loud," and Mr. Lewis returned to the car pretty quickly. RP 374. As they drove away, Mr. Lewis turned to Mr. Hieber and said, "[f]uck, Frank, fuck," seeming visibly upset. RP 376. When Mr. Hieber asked what he meant, Mr. Lewis said he "fucked up" but would not say more. RP 377. Later, at Mr. Lewis' brother's house, Mr. Hieber said he overheard Mr. Lewis telling his brother something about shooting "the guy." RP 397. Mr. Lewis' brother, Charles, testified that Mr. Lewis did not say anything about a shooting that day but it was obvious something was really bothering Mr. Lewis. RP 420-24.

Mr. Lewis changed his shirt at his brother's house and, according

to Mr. Hieber, the men removed the "spoiler" from the car and covered the car with a tarp. RP 380-86. Mr. Lewis' brother, Charles, testified that Mr. Lewis "always covers his car, he has a special tarp with water bottles to keep it from being blown off." RP 424-26. Charles Lewis also testified that nothing was removed from the car that day. RP 424. Charles' wife confirmed that it was, in fact, a day or so later that they removed the spoiler from the car. RP 411.

Police were led to Mr. Lewis when someone called in a tip after seeing a "crime stoppers" television ad. RP 446.

Mr. Lewis testified that Mr. Hieber told him that Mr. Holdorph owned him some dope and money, that he had talked to Mr. Holdorph and they were supposed to go over there to pick it all up. RP 469-70. Mr. Lewis believed that Mr. Holdorph was expecting them and had told them to come over, because that was what Mr. Hieber and Ms. Casterline had said. RP 476. Mr. Lewis also said Mr. Holdorph did not owe him any money and the whole thing was about Mr. Hieber and Ms. Casterline. RP 476.

Mr. Lewis did not have a gun when he got into the car but when they arrived at the Holdorph's Mr. Hieber handed him a gun and said, "take this in there with you," because Mr. Holdorph was a "tweak" and Mr. Lewis needed it for protection. RP 472. Mr. Lewis considered Mr. Hieber his "brother" so he really did not question it. RP 472.

When Mr. Lewis knocked on the door, Mrs. Holdorph said her son was there, then let Mr. Lewis in. RP 473, 484. Mr. Lewis shut the door and asked for her to call her son. RP 483. She seemed kind of upset that

he was there, but Mr. Lewis did not tell her why he was there because he did not want to put Mr. Holdorph's "business, like, out there." RP 483.

Mr. Holdorph came out of his room, rushed at Mr. Lewis and grabbed him. RP 488. Mr. Lewis then tried to put Mrs. Holdorph between him and the attacking man, hoping Mr. Holdorph would stop "engaging." RP 484-85. Mrs. Holdorph was kind of off balance, and they wrestled a little and her dog came at him so he kicked at it. RP 481-82. Mr. Lewis also managed to pull out the gun with his left hand. RP 481-82. Mr. Holdorph's grip was so strong that it scared Mr. Lewis, who had not expected any of this. RP 474. Mr. Holdorph and Mr. Lewis grappled for the gun while Mr. Lewis was trying to back away, and the gun went off. RP 481-89. Scared, Mr. Lewis then ran. RP 473.

Mr. Lewis testified that he did not intend to hurt Mr. Holdorph or anyone else, and was afraid Mr. Holdorph was going to hurt him when Mr. Holdorph charged him. RP 474, 492. He said that when the struggling with Mr. Holdorph was occurring he "really lost, like, train of thought, you know." RP 484. He felt that he was "fighting for [his] life." RP 485. The whole thing happened so fast that he did not even really remember pulling the gun out and did not have time to say anything. RP 485-86.

Mr. Lewis had never been to the Holdorph home before and was not driving his car when it was seen there earlier in the week. RP 478. Mr. Hieber, however, borrowed Mr. Lewis' car. RP 478.

Mr. Hieber admitted, on cross-examination, that the conversation he said he overheard at Charles Lewis' house was that Mr. Lewis said "[t]he guy grabbed for the gun," that it was "an accident and that the man

had gone for the gun." RP 397-99. Charles Lewis' wife testified about overhearing her husband and Mr. Lewis talking about two weeks later at Lewis' parents' house and hearing something about a shooting, "a drug deal gone bad," and that Mr. Lewis "went there for something and it didn't turn out the way that he had planned." RP 413. She also heard something about him feeling like "he was being - - might be harmed and he shot someone in self-defense." RP 414. Charles Lewis said that it was only at that time, not at the house the day of the incident, that Mr. Lewis told him about the incident and said that he did not mean for the gun to go off at all and it only happened because Mr. Holdorph was "on him," "jumped right into his face pretty much before he could get out" anything like "wait" or just that he was there for the money. RP 422-32.

D. ARGUMENT

1. THE DETERMINATION OF COMPETENCY SHOULD BE REVERSED

Under the state and federal due process clauses, a criminal defendant may not be tried unless he or she is competent. In re Fleming, 142 Wn.2d 853, 861, 16 P.3d 610 (2001); Medina v. California, 505 U.S. 437, 446, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). In Washington, there is even greater protection against the trial of a person who is not competent, under RCW 10.77.050. Fleming, 142 Wn.2d at 862. To prove competency in this state, there must be sufficient evidence that the defendant understands the nature of the charges, and is capable of assisting in his own defense. See State v. Hahn, 106 Wn.2d 885, 726 P.2d

25 (1986).

In this case, Mr. Lewis' due process rights were violated and the resulting competency finding was invalid, because the government failed to follow the mandatory statutory requirements applicable to the competency determination in his case and thus failed to ensure that he was competent prior to subjecting him to the criminal trial.

a. Relevant facts

Prior to trial, Mr. Lewis was committed pursuant to RCW 10.77.060 to Western State Hospital (WSH) for a 15-day evaluation due to concerns about his competency. CP 10-13. After evaluations were conducted, on June 2, 2004, Mr. Lewis was found incompetent by the court and ordered committed to WSH for 90 days of competency restoration efforts. CP 19-20..

At the competency hearing held on December 1, 6-9, 2004, Judge Fleming heard testimony from two state experts and one from the defense, and reviewed a report from another state expert who did not testify. 2RP 1-165, 3RP 169-256. All the experts agreed that Mr. Lewis was suffering from mental illness, disagreed about whether he was competent to stand trial. The prosecution's main witness was Ronald Hart, a licensed psychologist at WSH who evaluated Mr. Lewis and observed him while he was there. 2RP 20-155. .

When he was originally admitted to WSH, Mr. Lewis was experiencing both auditory and visual hallucinations and said he had a "chip" planted in his head. 2RP 39-40. Mr. Lewis admitted a very extensive substance abuse history, including a lot of different drugs,

starting when he was young and involving large quantities of LSD and extensive abuse of psilocybin, "magic mushrooms." 2RP 43-45. He also admitted that, as a child, he had repeatedly inhaled gasoline and as a teenager he "melted" his brain with organic solvents. RP 45. He inhaled Toulene, a "very powerful organic solvent," while in prison, a fact Dr. Hart found very significant because it could explain the impairments Dr. Hart found Mr. Lewis to be suffering. 2RP 44-46. Dr. Hart explained that extensive abuse of organic solvents was known to produce brain damage which could have caused the impairments Mr. Lewis had. 2RP 46.

Dr. Hart testified about his conclusion that, while Mr. Lewis was clearly suffering from mental illness, he was exaggerating the effects. 2RP 37-46. Dr. Hart made it clear he was not "comfortable" with diagnosing Mr. Lewis as "malingering," instead saying he was "embellishing." 2RP 36. He based this conclusion in part on Mr. Lewis' ability to function in a relaxed manner with his peers and then seeming "quite impaired" a few minutes later when staff would approach him, as well as other, similar, incidents. 2RP 69-72. Dr. Hart agreed that Mr. Lewis had "cognitive and emotional problems," that it was very possible he had hallucinations, and that he had "legitimate mental health problems." 2RP 47, 89.

Dr. Hart also testified that Mr. Lewis appeared to be "certainly below average" in his intellectual range, possibly in the upper extent of "the borderline range." 2RP 66. The upper extent of the borderline range would be upper 70 or low 80s, but Dr. Hart could not say whether Mr. Lewis was in that range because he did not conduct any formal I.Q. tests or

tests of Mr. Lewis' "intellect." 2RP 66, 103. Dr. Hart opined that Mr. Lewis was not "close at all" to being developmentally disabled, then admitted that an I.Q. of 70 would, in fact, amount to developmental disability. 2RP 104. He did not test for developmental disability because he believed Mr. Lewis was not developmentally disabled. 2RP 104.

Another state expert, Dr. Waiblinger, who worked as Mr. Lewis' treating physician, concurred that Mr. Lewis had "mental health problems," has exhibited or expressed psychotic symptoms consistent with his significant prior abuse of substances and damage caused by that, and has "significant personality disorders." 3RP 213. He said Mr. Lewis appeared to be of "sub-average intellectual function" but did no I.Q. testing. 3RP 220. He agreed that Mr. Lewis "certainly could" have trouble understanding complicated ideas and matters. 3RP 225. The doctor said Mr. Lewis has Axis I diagnosis of psychosis NOS and polysubstance abuse, and Axis II of antisocial personality disorder, and Axis IV of psychosocial stressors of moderate to severe range. 3RP 229.

Although he said that Mr. Lewis suffers from a psychotic disorder as well as substance abuse problem and anti-social personality disorder, the doctor, too, thought the symptoms were being exaggerated and that Mr. Lewis was competent to stand trial despite his mental conditions. 3RP 234-47. The defense expert, Doctor Vincent Gollogly, a licensed clinical psychologist who was formerly the clinical director of the state's Special Commitment Center, stated his opinion that Mr. Lewis was not competent.

4RP 14-34.[5] Contrary to the state's experts, he believed Mr. Lewis would not be able to assist in his own defense and understand his rights and be able to exercise them. 4RP 29-30. He did not believe Mr. Lewis had the capacity to understand proceedings such as competency proceedings or a multi-day trial. 4RP 30-77.

On the fourth day of the hearing, counsel noted that he had a question of whether Mr. Lewis was developmentally disabled, something which has to be evaluated based not only upon intelligence but also on other factors. 4RP 3-5. He argued that the government should have done an independent evaluation of that issue, as there was a statutory mandate requiring it. 4RP 6. He also stated that the court had "no choice" but to send Mr. Lewis back for an evaluation under the statute. 4RP 8.

The court inquired if Mr. Lewis could be developmentally disabled and still be competent. 4RP 8-9. Counsel said it was possible, but that the evaluation had to be performed by a developmental disability specialist. 4RP 9. The prosecutor suggested counsel was trying to "derail this hearing" and that the state's witnesses could testify that he was not developmentally disabled, but counsel again noted that they were not qualified to do so. 4RP 11-12. The court then asked the prosecutor to call back an expert on the issue, in "an abundance of caution." 4RP 13-14.

When asked about the issue of developmental disability, Doctor

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[5]Dr. Gollogly's reports were referred to and relied on by the parties and the court below, but apparently not filed in the court file. Trial counsel will be filing the documents and, once they are filed, counsel will file a supplemental designation of clerk's papers in order to ensure the Court has the complete record regarding competency.

Gollogly testified that he thought Mr. Lewis had an I.Q. of about 70-75, and that a person would have to have an I.Q. of below 70 to classify as developmentally disabled, "unless you have other deficits." 4RP 27. He stated that the determination of whether someone met the standard of being developmentally disabled would have to be done by an expert in that field, a "DDD psychologist." 4RP 61-62. He was not willing to state that he thought Mr. Lewis was developmentally disabled or that he was not, because he thought an expert needed to do that, but said:

> if you've got somebody with borderline intellectual functioning who has got serious memory problems, you know, just on the surface, it might be that he might qualify [as developmentally disabled].

4RP 62-63.

Dr. Hart was recalled by the prosecution and stated his opinion that Mr. Lewis did not meet the statutory definition of developmental disability. 4RP 79. He admitted he was familiar with the statute requiring that an evaluation of developmental disability be done for each defendant committed for a 90-day competency restoration but said it was "not what we do at Western State Hospital." 4RP 82. He stated they "do not have the staff, nor the resources necessary, to conduct those evaluations." 4RP 83. Despite the language of the statute, he said that such an evaluation is only done if there is a court order to do so. 4RP 84. A developmental disability specialist is only appointed if a court requires it, not just based upon the requirements of the statute. 4RP 92. Indeed, he said they try to do everything they can to keep people with developmental disability out of his center because such people are required to be given special treatment.

4RP 88. Although he said it might take "weeks, months" to do such an evaluation, he also admitted it could be done in 15 days if ordered. 4RP 87-91.

Dr. Hart admitted he did not consider the statute or rule defining developmental disability in reaching his opinion about Mr. Lewis. 4RP 91-93. Instead, he relied on Mr. Lewis' I.Q. and his observation of Mr. Lewis' "social facility with his peers" at the mental ward. 4RP 93. He also said what he knew about Mr. Lewis' history did not give him a suspicion that Mr. Lewis was developmentally disabled. 4RP 93. He conceded, however, that he did not do any intelligence quotient testing, and that his belief about Mr. Lewis' I.Q. was essentially "nothing more than an estimate." 4RP 94. He also admitted that I.Q. testing is, in fact, necessary for a determination of developmental disability. 4RP 95.

Counsel argued that the statute was clear and required the evaluation, and that it must be done by developmental disability experts. 4RP 96. The court ruled that Dr. Hart's opinion "based upon reasonable psychological probability and certainty" was "sufficient" to "resolve the issue of testing or further examination for developmental disabilities disorder." 4RP 97. When counsel asked if the court was holding that the statute did not have to be complied with, the court responded:

> If you get to the level where the experts tell you that it's necessary, sure you are going to have to comply with it, once you get to a level where there is an issue of developmentally disabled.

4RP 98. Counsel then asked for leave to provide a brief on the issue and the court said it would not grant the continuance requested but would allow further argument in the morning. 4RP 99. Counsel did not make

such arguments, and the court found Mr. Lewis competent despite his mental illnesses and defects. 5RP 1-41; CP 55-56.

b. The mandatory requirements of the competency statute were not followed and the determination of competency thus was not properly made

This Court should reverse the conviction and the finding of competency in this case, because the state did not comply with mandatory requirements put in place to ensure that competency is fully reestablished prior to a defendant standing trial. Under RCW 10.77.060(1)(a), whenever there is "reason to doubt" a defendant's competency, the court is required to appoint two experts to examine and report upon the defendant's mental condition and may order the defendant committed for up to 15 days for that purpose. The statute also requires that at least one of the experts must be a "developmental disabilities professional if the court is advised by any party that the defendant may be developmentally disabled." RCW 10.77.060(1)(a). Further, the report of the examination is required to contain an opinion as to competency either if the defendant "suffers from a mental disease or defect *or* is developmentally disabled[.]" RCW 10.77.060(3)(c) (emphasis added).

Thus, it is clear that the Legislature was concerned about the possibility that a person who was found incompetent might suffer not only from mental illness but also from developmental disability. In addition, the Legislature recognized that a different type of evaluation conducted by a person qualified as a "developmental disabilities professional" would be required in order to ensure a proper determination, defining such a professional as

> a person who has specialized training and three years of experience in directly treating and working with persons with developmental disabilities and is a psychiatrist or psychologist, or a social worker, and such other developmental disabilities professionals as may be defined by rules adopted by the secretary [of the department of social and health services].[6]

RCW 10.77.010(8).

In this case, no developmental disability assessment was ordered in the initial 15-day commitment and evaluation period. It is unclear from the record whether the court was presented with anything which might have indicated the need for such an evaluation, and Mr. Lewis is not therefore not arguing that it was error to fail to conduct the evaluation initially.

It was error, however, when no such evaluation was done as part of the 90-day commitment under RCW 10.77.090. That statute permits a court to stay a criminal proceeding after the initial 15-day commitment and report under RCW 10.77.060, and to commit the defendant for 90 days of competency restoration treatment if the court finds the defendant not competent. RCW 10.77.090(1)(a) and (b). RCW 10.77.090(1)(c) then provides the requirements for further evaluation, providing in relevant part:

> A defendant found incompetent shall be evaluated at the direction of the secretary and a determination made whether the defendant is developmentally disabled. Such evaluation and determination shall be accomplished as soon as possible following the court's placement of the defendant in the custody of the secretary.

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[6]WAC § 388-865-0150(4)(b) defines a "specialist" in developmental disability as someone who either meets the requirements of RCW 10.77.010(8) or is a "mental health professional" with at least a year of experience working with people with developmental disabilities.

Thus, under the statute, *all* criminal defendants committed for 90 days under RCW 10.77.090(1)(c) are to be evaluated for developmental disabilities as soon as possible after their commitment.

Here, in holding that the state did not have to comply with the statute, the trial court stated held that an evaluation for developmental disability was required only if "experts tell you that it's necessary" and there is an "issue" of whether the defendant has a developmental disability. 4RP 98. But RCW 10.77.090(1)(c) does not so provide. It unambiguously declares that every defendant "shall" be evaluated, not that evaluations are only required if there is a question about whether the defendant has a developmental disability or that there must be an expert opinion that such an evaluation is needed before one is required. It is a fundamental rule of statutory construction that where, as here, the language of a statute is plain and unambiguous, it is not subject to judicial "interpretation," especially an interpretation inconsistent with the plain language. See State v. Schultz, 146 Wn.2d 540, 559, 48 P.2d 540 (2002). In addition, a court may not judicially rewrite an unambiguous statute without violating the constitutional doctrine of separation of powers. See State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). The Legislature chose to make the evaluation mandatory for every defendant found incompetent and committed for 90 days of competency restoration. It was not the trial court's place to ignore that decision, regardless whether it thought the Legislature's choice was wise.

The state's failure to comply with the mandatory evaluation requirement compels reversal in this case. The "[p]rocedures of the

competency statute (chapter 10.77 RCW) are mandatory and not merely directory." Fleming, 142 Wn.2d at 873, citing, State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). Further, the procedures of RCW 10.77 serve the purpose of protecting the defendant's due process rights not to be tried unless a proper finding of competency is made. See State v.O'Neal, 23 Wn. App. 899, 901-902, 600 P.2d 570 (1979), review denied, 93 Wn.2d 1002 (1979). And the legislature has recognized that "existing programs in mental institutions may be inappropriate for persons who are developmentally disabled," and that additional, specialized services and treatments should be provided to such persons. RCW 10.77.095. Indeed, the determination of whether a defendant has a developmental disability affects even the procedure applicable for dismissal of criminal charges. See RCW 10.77.090(4) (for persons with developmental disability, such dismissal is after the first 90-day commitment instead of after the second such period, for those whose competency issues are solely based upon mental illness). And a person who has been committed even for a 90 day period has a right to adequate care and individualized treatment. RCW 10.77.210(1). Without the required evaluation, there was no way to know which services and treatment were necessary to ensure true competency restoration occurred. See, e.g., Youngberg v. Romeo, 457 U.S. 307, 323, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (failure to exercise "professional judgment" in treatment and evaluation violates due process); In re J.S., 124 Wn.2d 689, 700, 880 P.2d 976 (1994) (a course of treatment must be adequate and reasonably based on professional judgment to be constitutional).

Both due process and RCW 10.77.050 prohibit trying a person like Mr. Lewis who has been found incompetent "so long as such incapacity continues." See Fleming, 142 Wn.2d at 862. Further, failure to make an adequate inquiry into a defendant's competency is, in and of itself, a violation of due process. 142 Wn.2d at 863. The mandatory evaluation requirement is an essential part of the procedures the Legislature crafted to ensure that the defendant's fundamental "right not to stand trial when it is more likely than not that he lacks the capacity to understand" that which he must to be competent. See Cooper v. Oklahoma, 517 U.S. 348, 369, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). That right has "deep roots" and is of "fundamental character." Id. The trial court's decision on competency, made after the mandatory procedures were not followed and without a proper evaluation of whether Mr. Lewis was developmentally disabled, was in error.

In response, the prosecution may argue that Dr. Hart's cursory declaration that Mr. Lewis was not developmentally disabled was sufficient to satisfy the statute's requirement. Any such claim should fail, for several reasons. First, Dr. Hart was not a developmental disability specialist. Under RCW 10.77.120, applicable to all commitments under any provision of Title 10.77 RCW, "[t]he examinations of all developmentally disabled persons committed under this chapter shall shall be performed by developmental disabilities professionals." See also, RCW 10.77.140 (requiring periodic evaluations of committed person who is developmentally disabled by a "developmental disabilities professional"); RCW 10.77.060 (requiring that a person being evaluated

initially for competency and suspected of having a developmental disability be evaluated by a "developmental disabilities professional"). Second, he himself admitted that he did not consider the statute or rule defining developmental disability in reaching his opinion that Mr. Lewis does not meet that definition. 4RP 79, 91-93. Third, he based his conclusion in large part on Mr. Lewis' intelligent quotient (I.Q.), but admitted he did no actual I.Q. testing, that his declaration of Mr. Lewis' I.Q. was essentially "nothing more than an estimate," and that I.Q. testing is, in fact, necessary for an actual determination of developmental disability. 4RP 94-95.

Thus, by his own admissions, Dr. Hart's conclusion was not based upon exercise of his professional judgment after proper inquiry. And it is questionable whether a proper determination of whether someone is developmentally disabled can be made by a generalist who is not qualified as a specialist in the area, based largely upon an estimate of I.Q., formed without actual testing. See, e.g., RCW 71A.10.020(3) (mandating that the Department of Social and Health Services promulgate rules to ensure that developmental disability will not be determined solely based upon I.Q.).

Further, and more troubling, Dr. Hart admitted that he has a motivation to avoid making a finding that a patient has a developmental disability. He conceded that he was aware of the mandates of the statute and that WSH had specifically made the decision not to comply, based upon staffing and resource concerns, unless and until ordered to do so by a court. 4RP 82-84, 92. And he flatly stated that he and others there make it a *priority* not to deal with people who have developmental disabilities,

because such people are required to be given special treatment. 4RP 88. Dr. Hart's opinion that Mr. Lewis was not developmentally disabled, unsupported by adequate testing, conducted by someone not a specialist in the field, and based largely upon a factor the Legislature has deemed insufficient, does not amount to a proper "evaluation" under RCW 10.77.090(1)(c).

The prosecution is also likely to take the same position it took below - that the clear, mandatory testing requirement for all persons committed under RCW 10.77.090(1)(c) does not mean what it says. Below, the prosecution argued that RCW 10.77.095 effectively amends RCW 10.77.090 and permits the state to fail to comply with the evaluation requirement if it is too expensive. CP 37-40.

RCW 10.77.095, however, does not support the prosecution's claim. That statute provides, in relevant part:

> The legislature finds that existing programs in mental institutions may be inappropriate for persons who are developmentally disabled because the services provided in mental institutions are oriented to persons with mental illness. . .Therefore, the legislature believes that, where appropriate, and subject to available funds, persons with developmental disabilities who have been charged with crimes that involve a threat to public safety or security and have been found incompetent to stand trial. . .should receive state services addressing their needs[.]

RCW 10.77.095 clearly addresses cost concerns only in relation to the programs and services provided *after* there is a determination that a person is developmentally disabled. It does not support the refusal to comply with the mandatory evaluation requirement of RCW 10.77.090(1)(c) to make that determination in the first place.

In addition, RCW 10.77.090(1)(c) *already* reflects the

Legislature's concern for costs, again only in relation to the services provided after a determination has been made, not the determination itself. The statute provides, in relevant part, "[w]hen appropriate, and subject to available funds, if the defendant is determined to be developmentally disabled, he or she may be placed in a program specifically reserved for the treatment and training of persons with developmental disabilities[.]" RCW 10.77.090(1). Thus, again, the Legislature chose to include flexibility in the statute based upon concerns about cost only in relation to treatment options, not the original evaluation of whether there is a developmental disability. Any argument that cost considerations should somehow alter the plain language of RCW 10.77.090(1) should fail.

Despite their disagreements about whether he was legally competent due to his mental condition, all of the experts agreed that Mr. Lewis was clearly mentally impaired. And both the state and defense experts noted a very real delay in his responses to stimuli, and that he would always be delayed in significant ways. 2RP 38, 51, 102, 4RP 30, 74. Although they all estimated his I.Q. to be above 70, the normal cutoff for developmental disability, Dr. Gollogly made it clear that the I.Q. cutoff is actually not as significant when there are other mental issues. 4RP 27, 61-62; see also, RCW 71A.10.020(3). And the clinically accepted range of developmental disability is an IQ score of 70, with a five point margin of error. See Atkins v. Virginia, 536 U.S. 304, 309 n. 5, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Given Mr. Lewis' significant mental issues which have nothing to do with I.Q., it is extremely likely he would be found developmentally disabled, had he been properly evaluated. And

given the lack of sufficient evidence of proper evaluation, the trial court's finding that Mr. Lewis is not "mentally retarded" simply does not withstand review. CP 61; see State v. Hill, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994) (findings must be supported by sufficient evidence to convince a rational, fair-minded trier of fact of the truth of the declared premise).

Finally, any attempt by the prosecution to argue that Mr. Lewis somehow "waived" the issue of the failure to properly determine competency by conducting the evaluation should be rejected. It is true that the court gave counsel the opportunity to reargue the issue. 4RP 99. But it did so without giving him adequate time to conduct the research he needed to do. Id. To reargue the issue on the same basis that he had already argued it would have been, at best, futile, as the court had already been presented with the statute and its mandatory language and had already concluded that language did not mean what it said.

The state failed to comply with the mandatory requirements of the statute designed to ensure that the due process rights to be free from going to trial if incompetent. As a result, the full, required examination of Mr. Lewis was not done and was not presented to the court for the purpose of making its competency determination. The court's conclusion that the mandatory requirement was not, in fact, mandatory was in error and in violation of the doctrine of separation of powers. And the result was that the court's determination that Mr. Lewis was competent was flawed at best. This Court should reverse.

2. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT WHICH DEPRIVED APPELLANT OF HIS STATE AND FEDERAL DUE PROCESS RIGHTS TO A FAIR TRIAL AND COUNSEL WAS INEFFECTIVE

Prosecutors are quasi-judicial officers, entrusted with the duty to see that an accused receives a fair trial, and a duty to "refrain from improper methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). When a prosecutor commits misconduct, she does more than just violate a prosecutor's duties, she deprives the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22. Even absent objection below, misconduct compels reversal where the misconduct is so flagrant and prejudicial it could not have been cured by instruction. State v. Brown, 132 Wn.2d 529, 561, 40 P.2d 545 (1997), cert. denied, 523 U.S. 1007 (1998).

In this case, this Court should reverse, because the prosecutor committed misconduct which has been well-recognized as flagrant and prejudicial, and Mr. Lewis was deprived of his state and federal constitutional due process rights to a fair trial as a result. Further, counsel was ineffective in his handling of the misconduct.

a. Relevant facts

In closing argument, the prosecutor first described the trial as a search for "truth." RP 549. He noted that the bulk of the evidence came from the testimony of Mrs. Holdorph, then told the jury, "[w]hen you look at the evidence as a whole, it allows you to very reasonable conclude that Mrs. Holdorph's memory is solid and, *very importantly, that she has no motive to lie to you about what occurred.*" RP 549 (emphasis added). The prosecutor returned to this theme later, declaring that the differences in Mr. Lewis' version of events and the version presented by Mrs. Holdorph were "dramatically different" and that had the effect of "pitting his credibility directly against hers." RP 550. The prosecutor repeated his declaration that the versions of events were "dramatically different" comment, then went on:

> I ask you to consider, when you look at the testimony of each, *whether Mrs. Holdorph had any motive to lie to you. I ask you to see if you can come up with a motive why Mrs. Holdorph would lie to you about what happened in her home.*

RP 553 (emphasis added).

The prosecutor then "urged" the jury to deliberate on whether "the defendant's desire for self[-]protection[,] for self[-]preservation" was a motive for him to lie. RP 554. He then answered his own question, saying, "Of course, it is, to try to protect himself." RP 554.

b. The arguments were flagrant, prejudicial misconduct

The prosecution's argument was serious, flagrant and prejudicial misconduct, which deprived Mr. Lewis of his right to a fair trial. It is well-settled that it is "misleading and unfair to make it appear that an

acquittal requires the conclusion" that the prosecution's witnesses are lying. State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991); United States v. Richter, 826 F.2d 206, 209 (2nd Cir. 1987). The argument is improper and misstates the burden of proof and the jury's role, because the jury is not tasked with determining who is telling the truth and who is lying but rather only to determine if the prosecution has proven its case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). In addition, the argument incorrectly gives the jury the "false choice" between believing the witnesses are lying or telling the truth, whereas the "testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." Wright, 76 Wn. App. at 824-26; see State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied 131 Wn.2d 1018 (1997).

Here, the jury did not have to believe that Mrs. Holdorph was lying in order to acquit or believe Mr. Lewis that the shooting was accidental. Given the extreme stress she was under, her age and the fact that the incident happened incredibly fast, the jury could easily have simply believed that she was simply mistaken in her recollection.

Nor were the prosecutor's arguments a permissible comment on how the jury should resolve a "conflict" in witness testimony. Where such a conflict must necessarily be resolved in order to decide the case, it is permissible for the prosecutor to argue that, in order to believe the defendant, the jury must find the state's witnesses were mistaken. Wright,

76 Wn.. App. at 826. The argument "is not objectionable because it does no more than state the obvious and is based on permissible inferences from the evidence." Id.

Here, the prosecutor appears to have been trying to fit this case into the exception of Wright below, stating that the testimony of Mrs. Holdorph and Mr. Lewis were "dramatically" and "completely different" and that the effect was to pit Mr. Lewis' "credibility directly against hers." RP 550-53. This Court should not be misled. The objectionable comments here did not tell the jury that it would have to find that Mrs. Holdorph was *mistaken* - they told the jury it had to find that this traumatized, victimized elderly woman who lost her son in a violent, unexpected incident she witnesses was *lying* and more, that she had to have some *motive* to do so. Such argument is still misconduct under Wright. Wright, 76 Wn. App. at 826 n. 13.

Reversal is required. Even where, as here, counsel failed to object to the misconduct below, a reviewing court will still reverse if the misconduct is so flagrant and prejudicial it could not have been cured by instruction. State v.Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).[7] Here, no instruction could have cured the enduring prejudice caused by the prosecution's repeated arguments on this point. By telling the jury it had to find that Mr. Holdorph's elderly, traumatized mother was *lying* in order to believe Mr. Lewis, the prosecutor not only misstated the jury's role and presented a false choice, it also likely invoked strong emotional reactions

[7]Counsel's ineffectiveness in failing to object to the misconduct is discussed, infra.

against Mr. Lewis, the type of "bell" which cannot be unrung.

Further, because it is well-established that such arguments are misconduct, the fact that the prosecutor nevertheless made the arguments demonstrates that flagrant and ill-intentioned nature of the comments. Fleming, 83 Wn. App. at 214.

There was never any question in this case that Mr. Lewis held a gun, the gun went off, and Mr. Holdorph was killed. The only question was whether the gun went off due to an intentional act of Mr. Lewis, or by accident. The prosecutor's misconduct struck directly at the heart of the only issue the jury was required to decide. Further, "improper suggestions" made by a prosecutor "carry much weight against the accused when they should properly carry none," because the average juror will believe that a prosecutor will act in the interests of justice and act as befits an officer of the court and the people. Berger, 295 U.S. at 88. Most regrettably, here, the prosecutor making these arguments was the elected prosecutor himself, in whom the citizens of the county had clearly placed their confidence and faith by electing him. No jury instruction could have erased from the juror's minds the specter of being told Mr. Lewis was effectively accusing Mrs. Holdorph of lying, or the emotional reaction that likely invoked.

In the alternative, in the unlikely event that the Court believes that the enduring prejudice caused by the misconduct could have been erased by a proper instruction, this Court should reverse based on counsel's ineffectiveness in failing to object and request such an instruction. Both the state and federal constitutions guarantee the accused the right to

effective assistance. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996);6th Amend,; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Put another way, if Mr. Lewis can show that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

The only issue in this case is whether Mr. Lewis intended to cause Mr. Holdorph's death or it was a terrible accident. The misconduct went directly to the heart of that issue, misstating the jury's role and making it seem that they must find an elderly, grief-stricken old lady was deliberately lying in order to acquit. It is Mr. Lewis' position that the enduring prejudice caused by that argument could not have been erased by even the most strongly worded instruction. If, however, such erasure was even possible, reasonably competent counsel would have made the attempt to do so on his client's behalf, given the fact that the misconduct was on the only issue in the case and prevented the jury from fairly and impartially evaluating the evidence. This Court should reverse.

3. APPELLANT'S STATE AND FEDERAL CONSTITUTIONS RIGHTS TO PRESENT A DEFENSE WERE VIOLATED BY THE EXCLUSION OF EVIDENCE RELEVANT AND MATERIAL TO HIS DEFENSE

Both the state and federal due process clauses guarantee the accused the right to present a defense. Washington v. Texas, 388 U.S. 14,

19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 51 (1983), limited in part and on other grounds by, State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); 6th Amend.; 14th Amend.; Art. I, § 22. This right ensures the defendant the opportunity to present his version of the facts to the jury. See, State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Reversal is required where the defendant is prevented from presenting evidence which is relevant, material and necessary for his defense. Hudlow, 99 Wn.2d at 15-16.

In this case, Mr. Lewis' rights to present a defense were violated when the trial court excluded the relevant, admissible and extremely important evidence that methamphetamine can cause people who ingest large amounts to become paranoid and aggressive.

a. Relevant facts

At trial, after the medical examiner testified about the high level of methamphetamine found in Mr. Holdorph's blood during the autopsy, Mr. Lewis tried to elicit testimony from the examiner, based upon his training and experience, that such a high level of methamphetamine in a person's bloodstream may cause that person to become aggressive. RP 255. He argued it was relevant that such aggressiveness was known to be caused by the drug, in part because his claim was that he had acted in self-defense. RP 257-59.

The expert was then asked questions on *voir dire* which established that, generally, methamphetamine is a stimulant known to cause people to be paranoid, irritable and "have some irrational behavior and can be violent," although it affects people differently. RP 259. The court

questioned whether the "admission of some hypothetical" about the drug in general would help the defense or the denial of the evidence would "detract from the defense's ability to argue their theory of the case or present their evidence to the jury." RP 260-61. Counsel responded there was evidence Mr. Holdorph had charged at Mr. Lewis and gotten ahold of him and there was a struggle, and that Mr. Holdorph was afraid of Mr. Hieber and was expecting him to come over and that Mr. Holdorph had said he would "take care of him" if he did. RP 264. The court excluded the evidence, stating its belief that the defense would still be able to present its case without it. RP 266.

b. Appellant's rights to present a defense were violated

The court's ruling violated Mr. Lewis' state and federal constitutional rights to present a defense. Pursuant to those rights, the defendant is entitled to admit evidence which is relevant and material to his defense. Hudlow, 99 Wn.2d at 15; see Holmes v. South Carolina, ___ U.S. ___, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). Evidence is relevant if it has a tendency to make any fact which is of issue more or less probable than it would be otherwise. ER 401; State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). Expert testimony is admissible if it is based upon proper foundation and would be helpful to the trier of fact. ER 702, 703; see State v. Read, 147 Wn.2d 238, 249, 53 P.2d 26 (2002).

Here, the evidence was directly relevant and material to the defense. The question in this case was not whether Mr. Lewis was holding a gun and Mr. Holdorph ended up shot and killed. The question was whether Mr. Holdorph had rushed at Mr. Lewis and attacked him

unexpectedly, thus causing Mr. Lewis to pull out his gun in self-defense and the gun to go off accidentally. See, e.g., RCW 9A.16.030. Evidence that the very high level of methamphetamine Mr. Holdorph had in his bloodstream was known to potentially cause aggressiveness would have directly supported the defense that the shooting happened as Mr. Lewis said, as an accident, instead of as the prosecution claimed. And it would have explained why a man dressed only in a towel might have rushed at Mr. Lewis for no apparent reason, and grabbed him unusually strongly, thus causing the entire incident. See, e.g., State v. Hopkins, 113 Wn. App. 954, 960, 55 P.3d 691 (2002) (noting police officers in the case "understood generally that methamphetamine users can be aggressive"); Williams v. Heibert, 435 F. Supp. 2d 199 (W.D. N.Y. 2006) (noting a case establishing that evidence of drug use was relevant to a defense claim that the victim was acting "crazy" at the time of the incident).

Further, the evidence was not cumulative, because without it, the jury only heard that Mr. Holdorph had a high level of methamphetamine in his blood and was given no information about how that fact could be relevant to the case.

Indeed, the importance of this evidence to the defense - and the prejudice its exclusion caused to Mr. Lewis - was made clear by the prosecution's rebuttal closing argument below. After counsel tried to argue about the effect of the high level of methamphetamine in Mr. Holdorph's blood and how that might have made him aggessive and explained his attacking Mr. Lewis, the prosecutor declared, "[w]e don't know what effect these drugs may have had on Mr. Holdorph. There is no

evidence before you. We cannot know." RP 576.

There is something patently unfair about moving to prevent a jury from hearing relevant, admissible evidence and then relying on that absence in arguing the opposing party's theory should be rejected. The prosecutor's argument establishes that the evidence of how the drugs might have affected Mr. Holdorph *was* relevant. And because it went directly to the heart of the defense, the evidence was material. The trial court's exclusion of the evidence deprived Mr. Lewis of his state and federal constitutional rights to present a defense. This Court should therefore reverse.

4. THE COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL

A mistrial should be granted where the irregularity in the trial is so prejudicial that it deprives the defendant of a fair trial. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521, review denied, 123 Wn.2d 1031 (1993); see United States v. Katz, 445 F.3d 1023, 1034 (8th Cir. 2006). In reviewing the issue, the court looks at the seriousness of the error, whether the evidence was "cumulative of other evidence properly admitted," and whether the irregularity could be cured by an instruction to disregard the improper evidence. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

This Court should reverse, because the trial court erred in denying Mr. Lewis' motions for mistrial and the result was that Mr. Lewis' state and federal constitutional rights to a fair trial were violated.

a. Relevant facts

At trial, Mr. Hieber testified, at one point, that it was his "understanding that he [Lewis] had just been released from the penitentiary." RP 359. A moment later, outside the presence of the jury, counsel moved for a mistrial, arguing the evidence was highly prejudicial, that it was impossible to "unring the bell," and that the improper evidence went directly to the defense that Mr. Holdorph was the aggressor, because even if the jury was instructed to disregard, the jury would still know "in the recesses of their mind" that Mr. Lewis "at the very least, did something serious enough to go to the penitentiary, and it was more serious than anything that this witness did because he's not testifying that he ever went to the penitentiary." RP 359-64. In addition, because there was a corrections officer on the jury, counsel stated that the jury would be informed as to how serious it was to be in the penitentiary, rather than just "jail." RP 366-67. He also argued that any instruction to strike would simply draw attention to the prejudicial evidence, which was why a mistrial was the only remedy which could ensure Mr. Lewis got a fair and impartial trial. RP 365-66.

After a recess, the court denied the motion, finding that a mistrial was not required because the jurors might assume "that he was incarcerated for drugs and that it had nothing to do with any act of aggression." RP 368. The parties then agreed to have the judge read the

question and then instruct the jury to disregard the answer. RP 370.[8]

Later, when an officer was testifying about how police focused on Mr. Lewis, after reporting that information about his car and name was called in anonymously after a "crime stoppers" ad on television, the officer then testified that he checked the name in his "computer system which lists people that have had prior contact with law enforcement." RP 446-48. Counsel objected, the testimony was stricken, and, outside the presence of the jury, counsel again moved for a mistrial, based on the fact that the prosecutor had"gotten out once again" that Mr. Lewis has "had contact with the criminal justice system." RP 447. In response, the prosecutor claimed the evidence was cumulative, because a former police officer named Michael Ostrander had already testified that he had contact with Mr. Lewis at one point. RP 447-48.

Although the court recognized that the testimony was "a dangerous area to go with this defendant," the court denied the motion, telling the prosecutor to "kind of skip this and get to the point." RP 448-49.

b. The failure to grant the mistrial motions deprived Mr. Lewis of his rights to a fair trial

The trial court erred in denying the motions for mistrial. Evidence of prior convictions or contact with police is extremely prejudicial, as it likely to lead the jury to believe the defendant had a propensity to commit a crime. See State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997).

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[8]Counsel also stated that he planned to file transcripts and reports of interviews conducted of Mr. Hieber which he said indicated that Mr. Hieber had given the same response at least twice in those interviews. RP 371. No such items were ever filed. RP 371.

Further, here the evidence was not "cumulative," despite the prosecution' claims to the contrary. Mr. Ostrander's testimony established simply that, in 2002, he was a police officer and came "into contact" with Mr. Lewis, identified him by his Washington state identification car, and that he was driving a purple 1989 Mustang with a rear spoiler when Mr. Ostrander "saw the need to contact" him. RP 295-97.

That testimony indicated only that Mr. Lewis had been pulled while driving his car, for some unknown reason. At best, it told the jury that Mr. Lewis might have engaged in speeding or some other traffic infraction. While that evidence might have been "cumulative" if the erroneous evidence was just that Mr. Lewis had "prior contacts with police," it was not cumulative of the comment that Mr. Lewis had committed a crime so serious that he was in the penitentiary. And it was not cumulative of the prejudicial implication that Mr. Lewis had just been released for whatever his prior crime was and was already out committing another crime.

Nor was the prejudice erased by the instruction. As counsel noted below, the instruction only drew attention to the improper testimony. And it is now well-accepted that a defendant is far less likely to be acquitted once a jury is made aware of his prior crimes or convictions. Hardy, 133 Wn.2d at 710-11. Further, it is recognized that, while the jury is presumed to follow instructions to disregard, where, as here, evidence may be so "inherently prejudicial" that no instruction could cure it. Escalona, 49 Wn. App. at 255.

In response, the prosecution may rely on Condon, supra, and argue

that the errors here do not compel reversal. In Condon, a witness testified that the defendant had called her "when he was getting out of jail." 72 Wn. App. at 648. Counsel objected, the trial court struck the remark, and the jury was instructed to disregard the comment. A moment later, the witness said the defendant had asked her to pick him up from jail. The jury was excused, a motion for mistrial denied, and the court instructed the jury that it was to disregard any references to the defendant having been in jail, and those references "should not be considered by you in any way in your deliberations upon this case." 72 Wn. App. at 648. Then, during cross-examination, the witness testified that she was not allowed to say anything about it but the defendant "was in a desperate situation that night." Id.

In declining to reverse, Division One relied on 1) its belief that the reference was "ambiguous" because the fact of being in jail "does not indicate a propensity to commit murder," 2) the fact that a person can be in jail without being convicted of a crime, and 3) the fact that the evidence that the defendant had committed the murder was "very strong," including the defendant's own confession to having committed the crime. 72 Wn. App. at 650.

Here, while the testimony that someone was in prison is somewhat ambiguous as to the reason why the person was there, a person cannot be in prison without being convicted of a serious crime. And there was a juror who was well aware of that fact, given the juror's DOC background.

Further, here, unlike in Condon, the question was not whether the jury would use the evidence as propensity evidence that because he had

committed prior crimes, he had killed Mr. Holdorph. There was no dispute that Mr. Lewis committed the act resulting in the death. The only question was whether he had the required intent or it was an accident. Evidence that he had previously committed an offense serious enough to subject him to prison and that he was already engaging in potential criminal activity after he had "just" been released was highly likely to raise in the jury the emotional response that the defendant was a criminal "type" whose claims of accident should not be believed. The irregularities were serious, the evidence prejudicial, and the trial court abused its discretion in denying the motions for mistrial, and this Court should reverse.

5. CUMULATIVE TRIAL ERROR COMPELS REVERSAL

Even if this Court finds that the trial errors in this case, taken separately, do not compel reversal, this Court should reverse based upon their cumulative effect. It is well recognized that the cumulative effect of trial errors can deprive a defendant of his state and federal due process rights to a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United Sates v. Preciado-Cordobas, 981 F.2d 1206, 1215 n. 8 (11th Cir. 1993); Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992).

Here, the errors all went to the heart of the case. The misconduct told the jury that it was required to find that Mrs. Holdorph was lying in order to believe Mr. Lewis and convict, thus misstating the jury's role, giving them an improper "false choice," and preventing them from fairly evaluating the evidence. It also likely inflamed their passions against Mr. Lewis, for accusing an elderly, grief-stricken mother of lying for no apparent reason. The errors of denying the motions for mistrial ensured

that the jury knew that the man on trial had not only had previous contacts with police, something which many jurors might find foreign, but that he had previously been convicted of something so serious that he was in the penitentiary for it. And the jury learned that he had just been released and was committing new criminal acts, thus inflaming their fears about recidivist criminals in the community. Finally, the error in excluding the relevant, admissible evidence prevented the jury from fairly evaluating Mr. Lewis' claim of what occurred that day.

All of these errors, taken together, rendered the proceedings far, far short of the constitutionally mandated fair trial to which Mr. Lewis was entitled. Even if the individual errors do not separately compel reversal, their cumulative effect does, and this Court should so hold and should reverse.

6. THE PRIOR CONVICTIONS WERE INVALID AND APPELLANT'S RIGHTS TO TRIAL BY JURY WERE VIOLATED BY THE JUDGE'S FACTUAL FINDINGS ON IDENTITY

This Court should also reverse the sentence of life without the possibility of parole because the prior convictions used as "strikes" were constitutionally invalid on their face and counsel was ineffective. Further, the trial judge erred and violated Mr. Lewis' state and federal rights to trial by jury and proof beyond a reasonable doubt by making factual determinations regarding identity by a preponderance of the evidence and relying on those determinations to increase the sentence which could have been imposed based solely on the jury's verdict.

a. Relevant facts

In this case, the defendant was alleged to have the following prior convictions:

NUMBER	CRIME	DATE OF CRIME	TYPE
(not provided)	Att. Assault 2	06/12/1990	Juvenile
94-1-00343-9	Assault 2	01/23/1994	Adult
95-1-01917-1	Kidnap 1	04/19/1995	Adult

CP 175. He was convicted of second degree murder with a firearm enhancement, for a crime committed on July 23, 2002. CP 175.

At sentencing on October 28, 2005, the prosecution called Steven Wilkins, a "forensic specialist" with the sheriff's department, to testify about having compared copies of a fingerprint card produced at the time the defendant was taken into custody to certain documents. RP 600. He testified that he compared a "certified Xerox copy" of that fingerprint card with documents contained in files for cause 95-1-01917-1 in order to determine if the fingerprints belonged to the same person, and gave his opinion that they did. RP 603. He also testified that he did the same with the other adult conviction, as well, although he said nothing about any comparison of prints on the juvenile case. RP 604-605. He also produced a booking photo he said was from one of the incidents. RP 602.

In cross-examination, the expert testified that he compared four prints on the judgments and sentences but could not recall how many points of similarity he observed on any of the fingers, for either of the cases. RP 607-608.

Mr. Lewis argued that there was an insufficient certification on the documents for the 1994 case. RP 610. He also challenged the sufficiency

of the prosecution's evidence of identity, stating "being identical in name alone is not enough." RP 610. The court responded that all three of the judgments and sentences contained the same social security number, date of birth, and full name of Robert Edward Lewis. RP 611. The court then ordered a sentence of life without the possibility of parole. RP 611-612.

b. Appellant's state and federal constitutional rights to trial by jury and proof beyond a reasonable doubt were violated

First, this Court should reverse the sentence of life without the possibility of parole, because the sentence was imposed in violation of Mr. Lewis' rights to trial by jury and proof beyond a reasonable doubt. Both the state and federal constitutions guarantee those rights. State v. Manussier, 129 Wn.2d 652, 656, 921 P.2d 473 (1996); 5th Amend., 6th Amend., 14th Amend., Wa. Const. Art. I, §§ 3 and 22. The rights extend not only to the facts proven at trial, but also to any facts at sentencing which increase the range of punishment that could be imposed beyond that which is authorized by the jury's verdict. Blakely, 542 U.S. at 303-305; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The protections described in Blakely and its ancestor, Apprendi, apply to such facts regardless whether they are labeled "sentencing factors" or something else. See Ring v. Arizona, 536 U.S 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). So long as a fact serves to increase the punishment the defendant faces, it matters not if the fact is called an "aggravating factor" or a "sentencing factor" or even a "non-element;" it is still an element and under the Sixth Amendment must be proved to a jury beyond a reasonable doubt. Id; see Apprendi, 530 U.S.

at 471-90.

In this case, appellant's state and federal rights to trial by jury and proof beyond a reasonable doubt were violated when the sentencing court made factual findings regarding identity and then relied on those findings in imposing the sentence. In general, under RCW 9.94A.500(1), the prosecution has the burden of proving a defendant's criminal history for sentencing purposes, by a preponderance of the evidence. Under the POAA, the prosecution is required to prove that the defendant has two prior "strike" crimes. State v. Thorne, 129 Wn.2d 736, 921 P.3d 514 (1996); former RCW 9.94A.570 (2003). A certified copy of a judgment and sentence is the "best evidence" of a prior conviction, but other "comparable documents of record or transcripts of prior proceedings" may also be introduced, provided the prosecution show "that the writing is unavailable for some reason other than the serious fault of the proponent." State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979), quoting, McCormick, *Handbook of the Law of Evidence,* § 230, at 560 (2nd ed. 1972); State v. Labarbera, 128 Wn. App. 343, 347, 115 P.3d 1038 (2005). A defendant has no duty to disclose or admit to any prior convictions, unless he or she is convicted pursuant to a plea agreement. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002).

Because most prior convictions were obtained after proof to a jury beyond a reasonable doubt, some courts have found that the U.S. Supreme Court has created an exception for Blakely where all that is being proved is that the prior conviction exists. Apprendi, 530 U.S. at 490. The exception is construed narrowly, and only applies to the fact of whether a

prior conviction exists, not other facts. See Apprendi, 530 U.S. at 490; Jones v. United States, 526 U.S. 227, 248-29, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). The reason for the exception is that the fact of the prior conviction was "entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilty beyond a reasonable doubt." Apprendi, 530 U.S. at 496.

Thus, in State v. Hughes, 154 Wn.2d 118, 141-42, 110 P.3d 192 (2005), reversed in part on other grounds by, Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), the Supreme Court examined the scope of the prior conviction exception and distinguished between the fact of whether a prior conviction *existed* and other facts relating to that prior conviction, such as whether such an offense shows "rapid recidivism," or is part of an "[o]ngoing pattern of same criminal conduct." 154 Wn.2d at 141-42; see also, In re the Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005) (sentencing court cannot examine underlying facts of a foreign conviction to determine comparability). Construing the "prior conviction" exception narrowly as mandated, the Hughes Court held that where the sentencing court goes beyond just stating the fact of the prior conviction into making "new factual determinations and conclusions," Blakely mandates proof to a jury beyond a reasonable doubt. 154 Wn.2d at 141-42.

Here, just as in Hughes, the question was not limited to whether the prior convictions *existed* but involved the separate factual determination of whether they were committed by the same man who was before the court for sentencing, i.e., his identity. To make its

determination, the court had to weigh and evaluate evidence and make findings about such things as whether the fingerprints looked the same, whether it appeared the same signature was on the various documents, and the weight to give to the testimony of the expert. These tasks went far outside the narrow prior conviction exception. Further, it is well-settled that identity is a question of fact. See State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974); State v. Salas, 127 Wn.2d 173, 185, 897 P.2d 1246 (1995).

Before Blakely, the Supreme Court had held that the prosecution was only required to prove identity by a preponderance of the evidence, and that the findings need not be made by a jury but could be made by the court. State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, amended, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). In addition, in Ammons, the Court held that the fact that the defendant and the person named in the prior conviction had the same "identity of names" was sufficient evidence to satisfy the burden unless the evidence was "rebutted" by sworn testimony from the defendant that some of the convictions were not his. Ammons, 105 Wn.2d at 189-90. If the defendant presented such evidence, that would

> suspend the use of the prior conviction in assessing the presumptive standard sentence range until the State proves by independent evidence, for example, fingerprints . . that the defendant before the court for sentencing and named in the prior conviction are the same.

105 Wn.2d at 189-90.

Under Blakely, however, Ammons retains no currency. Ammons was based upon an understanding of the nature of what constituted a "fact"

and an "element" and what the Sixth Amendment required at the time. Now, after Blakely, it is clear that any fact which increases the punishment the defendant faces beyond that which he faced based solely upon the jury trial must be proved to a jury, beyond a reasonable doubt. Blakely, 542 U.S. at 302-305.

Here, the jury trial only established that Mr. Lewis was the person who committed the *current* crime. It did not establish that he was the same person mentioned in the documents the prosecution presented as supporting criminal history.

Thus, Mr. Lewis' state and federal constitutional rights to trial by jury and proof beyond a reasonable doubt were violated at sentencing. The question of whether such violations can ever be harmless has been settled under federal law, although the Washington Supreme Court has held it cannot. See Recuenco, 126 S. Ct. at 2548;154 Wn.2d at 141-42.

This Court need not decide the extent to which Washington law should be reconsidered after Recuenco, because even under the harmless error standard reversal is required. An error of this type can only be harmless if the prosecution can prove there is not possibility the result could have been different had the error not occurred. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The prosecution cannot meet that burden here, because the evidence was insufficient to prove, beyond a reasonable doubt, that the person being sentenced was the same as the person who was convicted of the prior offenses in 1994 and 1995. As noted by counsel below, the documents for the 1994 cause do not include a proper certification -

indeed, the certificate was not even signed. See Supp. CP ___ (Appendix A).

Further, and more significantly, the testimony of the state's expert was insufficient to support a finding of identity beyond a reasonable doubt. Fingerprint identification involves examination of three different issues: the shape of the ridge lines, specific ridge details, and sweat pores. Schwinghammer, *Note: Fingerprint Identification: How "The Gold Standard of Evidence" Could Be Worth Its Weight,* 32 Am. J. Crim. L. 265 (2005). Here, the witness testified only that he found the fingerprints were from the same person, without any explanation whatsoever as to how he reached that conclusion. Indeed, his only testimony was that he did not recall how many "points" he found when conducting his analysis. This refers to the second issue, that of specific ridge details, which involves comparison of "points of similarity" or "points of identity. Id.

There is, in fact, "no standard or agreement among fingerprint examiners as to either the precise number or nomenclature of different" details which should be or even can be compared. 32 Am. J. Crim. L at 269-70. But it is clear that the fewer "points" of similarity there are, the less likely the match and the more there is room for identification error. See, e.g., Schwinghammer, supra, 32 Am. J. Crim. L. at 285-86; Lawson, *Can Fingerprints Lie? Re-weighing Fingerprint Evidence in Criminal Jury Trials,* 31 Am. J. Crim. L. 1 (2003). At a minimum, in order to evaluate the strength and reliability of the identification the expert had made, the court needed to hear how many points of similarity were found. See, e.g., State v. Folkerts, 43 Wn. App. 67, 74, 715 P.2d 157, review

denied, 715 Wn.2d 1020 (1986) ("overwhelming evidence" includes fingerprints with more than 20 points of similarity); State v. Mangan, 575 F.2d 32, 46 (2nd Cir.), cert. denied, 439 U.S. 931 (1978) (expert presented no notes of examination, no report of points of similarity, nothing from which the evidence would be able to be evaluated).

It is worth noting that there are very serious questions now being raised about whether fingerprint identification is even minimally reliable. Disturbing results of testing of a sampling of "qualified" fingerprint identification experts revealed that only 45% of them were able to correctly perform and identification. See Grieve, *Possession of Truth*, 46 J. Forensic Identification 521, 524 (1996); La Morte, *Comment: Sleeping Gatekeepers: United States v. Llera Plaza and the Unreliability of Forensic Fingerprinting Evidence under Daubert*, 14 Alb. L. J. Sci. & Tech. 171 (2003). And recent high profile cases have shown that even the most experienced, qualified experts viewing exactly the same evidence can and do reach very different results. See Schwinghammer, supra, 32 Am. J. Crim. L. at 285-86 (noting the 2004 arrest of Brandon Mayfield, an Oregon lawyer, as a suspect in a bombing, whose fingerprints were identified by the FBI as a "match" with those of a bomber based upon the conclusion there were 15 or more "points," while Spanish authorities found only 8 and later found another man whose fingerprints were a far better match; the FBI subsequently departed from its repeated claims that the print was a "100 percent identification" and an "absolutely incontrovertible match").

The evidence in this case would not have supported a finding by a

jury of identity, beyond a reasonable doubt. The state's witness simply testified that he found the match and, apparently, it was expected that the court would just accept that identification without any information on how the conclusion was reached or even the reliability of the identification. It is questionable whether the evidence in this case even rose to the level of proof by a preponderance, let alone beyond a reasonable doubt. The error is not harmless in this case.

Without the improper findings of identity, made in violation of appellant's rights, the only sentence which could have been imposed would have been a standard range sentence for second-degree murder and a five-year firearm enhancement, far shorter than life without the possibility of parole. See former RCW 9.95A.515 (2002); RCW 9.94A.533 (2002). On remand, because appellant specifically objected to the proof of identity below, the prosecution is not entitled to another opportunity to meet its burden of proof. See Lopez, 147 Wn.2d at 520-21. Further, there is no statutory authority to empanel the necessary jury. Recent amendments to the exceptional sentencing scheme mention nothing about proof of identity for sentencing purposes, and could not in any event be applied where, as here, the crime occurred well before the amendments. See Laws of 2005, ch. 68 § 7; In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). Reversal is required.

c. The prior convictions for "strike" crimes were constitutionally invalid

Reversal is also required because the POAA sentence depended upon prior convictions which were constitutionally invalid on their face,

and counsel was ineffective in failing to raise the issue at sentencing. Under the POAA, a person who has been convicted of two prior "most serious" offenses on separate occasions and who commits a third such offense is sentenced to a mandatory sentence of life in prison without the possibility of parole. Former RCW 9.94A.570 (2003).[9]

Prior convictions which are constitutionally invalid on their face cannot be used at all sentencing proceedings, including those involving a POAA sentence. See, e.g., Ammons, 105 Wn.2d at 187-88; United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). A conviction is constitutionally invalid on its face if it "without further elaboration evidences infirmities of a constitutional magnitude." Ammons, 105 Wn.2d at 188. Where the prior conviction was entered as part of a plea, the phrase "on its face" means "those documents signed as part of a plea agreement," as well as the judgment and sentence. In re Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000).

Here, the documents considered as part of the plea agreements in both the 1994 and 1995 cases demonstrate that those convictions are constitutionally invalid on their face. Under the state and federal due process clauses, a guilty plea must be knowing, voluntary and intelligent. In re Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). A plea does not meet that standard unless the defendant was informed of all "direct" consequences of a plea. State v. Ross, 129 Wn.2d 279, 284,

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[9]Because appellant was convicted of a crime which was committed in 2003, the version of the statute in effect for this case, in effect at that time, will be cited herein.

916 P.2d 405 (1996). A consequence is direct and not collateral if it "represents a definite, immediate and largely automatic effect" on the defendant's punishment. State v. Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002), quoting, State v. Ward, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994); Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1365-66 (4th Cir.), cert. denied, 414 U.S. 1005 (1973).

For the 1994 offense, the charge was first-degree assault for an incident which took place on January 23, 1994. Supp. CP ___ (Information).[10] That charge was amended to second degree assault, apparently as part of the plea agreement, on March 23, 1994. Supp. CP ___ (Amended Information; Statement of Defendant on Plea). The plea indicates on it that it is an Alford/Newton plea, and that the defendant "was present when Marshall Sablau [sp] assaulted" the victim with a shotgun. Supp. CP ___ (Statement). The judgment and sentence indicates a sentencing range of only 12-14 months in custody. Supp. CP ___ (Judgment and Sentence).

For the 1995 charge, the information alleged first degree kidnapping for an incident committed April 19, 1995, alleged to have been committed in two alternative ways. Supp. CP ___ (Information). In the Affidavit for Determination of Probable Cause was the statement that the prosecution "gives notice of intent" to add a deadly weapon enhancement and a count of assault in the second degree. Supp. CP ___ (Affidavit). The

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[10]The packets of information for each of the alleged prior offenses were admitted as exhibits at sentencing. A supplemental designation of clerk's papers for those documents has been filed, and they are attached for the Court's convenience as Appendices A (1994 case) and B (1995 case).

Statement of Defendant on Plea indicates that the defendant was entering an Alford plea to first-degree kidnapping, and "pleading guilty to take advantage of a negotiated plea agreement and because a reasonable person might find" him guilty based on the state's evidence. Supp. CP __ (Statement of Defendant on Plea). The judgment and sentence ordered him to serve 84 months in custody. Supp. CP ___ (Judgment and Sentence).

Both of these pleas were entered after the effective date of the POAA, December 2, 1993. See, e.g., State v. Rivers, 129 Wn.2d 697, 701, 921 P.2d 495 (1996). Yet nowhere in either plea agreement is there any reference whatsoever to the fact that the crimes for which the pleas were being entered were "most serious offenses" under the POAA, which exposed him to spending the rest of his life in prison without the possibility of parole automatically if he received a third such conviction. See Supp. CP ___, ___ (Appendix A and B).

In the past, courts have held that the fact that a defendant would be subject to a "habitual criminal proceeding" was a "collateral effect of pleading guilty." No Washington court appears to have addressed the question of whether that holding retains currency, however, under the POAA. Even a cursory reading of the caselaw reveals that it does not.

In State v. Johnston, 17 Wn. App. 486, 564 P.2d 1159, review denied, 89 Wn.2d 1007 (1977), for example, this Court held that the possibility that a defendant who pled guilty might be subject to a "habitual criminal proceeding" under former RCW 9.92.090 was not a "direct consequence" of the plea about which the defendant had to be informed

for the plea to be valid, because:

> Even if the prosecuting attorney has knowledge of prior convictions he may, in the proper exercise of his discretion, elect not to file such charges. On the other hand, should he choose to file them the defendant must be arraigned on a supplemental information and is entitled to a jury trial with his full panoply of rights before the necessary finding of habitual criminal status is reached, if ever.

17 Wn. App. at 492 (citations omitted). The Johnston Court contrasted other statutes which provided "enhanced penalties" in certain circumstances, noting that those statutes are a direct and natural consequence of the plea because a finding that they apply "irrevocably forbids the court from exercising its independent judgment concerning" the sentence to impose. Johnston, 17 Wn. App. at 492, quoting, State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972). The Johnston Court noted that acceptance of a plea of guilty "merely made him a member of a particular class, subjecting him to the *possibility* of a subsequent independent trial, in the State's discretion, to determine his recidivist status." 17 Wn. App. at 494 (emphasis in original). In addition, the Court relied on several "practical considerations," including that the prosecution "often does not have evidence of prior convictions at hand during plea negotiations," speedy trial rules make it impractical to expect that the prosecution will get such information, and even if the prosecution knows of the prior convictions, it may not decide to "press for habitual criminal status" unless the defendant later breaches the plea agreement or commits other crimes before sentencing. 17 Wn. App. at 496-97.

Similarly, in Cuthrell, supra, the Court noted that collateral consequences are consequences which are "possible," "peculiar to the

individual," discretionary and "*may* flow from a conviction of a plea," rather than being "definite," practical, or "largely automatic." Cuthrell, 475 F.2d at 1365-66. The Court concluded that the possibility of involuntary commitment which existed after the entry of the plea was not a "direct" consequence, because commitment was not an "automatic" result of the plea and the plea "simply made him a member of a class as a result of which he *might* be ordered to be evaluated by trained experts" who might conclude such commitment was proper, and, further, commitment would only occur after a "subsequent, independent civil trial." 475 F.2d at 1366.

In State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980), the Supreme Court agreed with Johnston that the possibility of an habitual offender proceeding was a "collateral" and not direct consequence of the plea and that a plea was consistent with due process even though it did not advise the defendant of the possibility "that habitual criminal proceedings *could* be filed against him" as a result. 93 Wn.2d at 304 (emphasis added). The Court reached its conclusion based upon the fact that the habitual offender status was not an "automatic" result of the plea, the prosecutor had "discretion on whether to file habitual proceedings," and the defendant's "status as an habitual offender is determined in a subsequent independent trial in which defendant has a right to counsel, the right to subpoena and cross-examine witnesses, the right to discovery, and the right to trial by jury." 93 Wn.2d at 305-306.

Those rights, and that discretion, no longer exist. Under the POAA, neither the courts nor the prosecution has any discretion

whatsoever about seeking a sentence of life without the possibility of parole. Thorne, 129 Wn.2d at 786-64. Where the statutory prerequisites are met, the sentence *must* be sought, and *must* be imposed. Id. Further, currently, POAA proceedings are treated as if they involved simply a sentencing enhancement, proven to a judge by a preponderance, not a jury beyond a reasonable doubt. See, e.g., State v. Smith, 150 Wn.2d 135, 175 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002); Thorne, supra; Manussier, supra.

Indeed, the Supreme Court has specifically rejected the idea that the POAA was anything less than a radical change to the old habitual offender scheme, specifically *because it is mandatory* and not subject to a discretionary decision by the prosecution. See Thorne, 129 Wn.2d at 762 n. 5 (rejecting the King County Prosecutor's argument that the POAA was "patterned after and is to be interpreted in the same manner" as the habitual offender statute on that basis). Instead, the POAA "did not amend or replace the habitual criminals statute" but was "enacted as an amendment to the SRA." Thorne, 129 Wn.2d at 763.

Thus, the POAA represents an entirely new scheme, not to be equated with "habitual offender" proceedings of old. Instead of being discretionary, seeking a POAA sentence is mandatory. Instead of being tried to a jury, it is imposed by a judge. Instead of having to be proved beyond a reasonable doubt, it is proved by a preponderance. And instead of being a possibility, it has become a certainty, the "automatic" result of having the predicate number of "strikes." The effect of pleading to a strike

crime under the POAA is nowhere near comparable to the effect of entering a plea for a crime which *might have, possibly* subjected a defendant to further proceedings for habitual offender status someday, at the prosecution's discretion. This Court should hold that a defendant is entitled to be informed that he is pleading to a "most serious offense" which is a "strike," because that plea *will* subject him to a sentence of life in prison without the possibility of parole, without fail, if he has two other strike crime convictions.[11] See, e.g., State v. Morley, 134 Wn.2d 588, 620, 952 P.2d 167 (1998) (where a defendant was unaware that a court martial proceeding had resulted in a strike, he was clearly misinformed of the potential sentence and thus equity required allowing him to withdraw the plea).

The failure to inform the defendant of the fact that he was pleading to a "strike" crime is especially egregious where, as here, the pleas entered were Alford pleas. Such pleas are "inherently equivocal," amounting to not an admission of guilt but a weighing of the alternatives and a decision to accept a deal in light of the options available. In re Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). A defendant entering such a plea has engaged in a cost-benefit analysis of which option is best for them. State v. D.T.M., 78 Wn. App. 216, 219, 896 P.2d 108 (1995).

As a result, a court accepting such a plea must exercise "extreme

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[11] Notably, the current plea form contained in CrR 4.2(g) requires "NOTIFICATION RELATING TO SPECIFIC CRIMES," the first of which provides:

> This offense is a most serious offense or strike as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the offense for which I am charged carries a mandatory sentence of life without the possibility of parole.

case to ensure that the plea satisfies constitutional requirements." 109 Wn.2d at 277-78. The standard for determining the validity of an Alford plea is whether the plea "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Alford, 400 U.S. at 31. Learning that the plea will have "additional consequences of an unquestionably serious nature" is likely to "rapidly" change the "calculations about the costs and benefits of standing trial." State v. Stowe, 71 Wn. App. 182, 188, 858 P.2d 267 (1993). As a result, "[m]isinformation with respect to the outcome of an Alford plea is especially problematic." Id.

There can be no question that the decision of whether to enter even a standard guilty plea would be affected by the knowledge that the crime to which you are pleading is a crime which will automatically support sending you to prison for the rest of your life if you have two other, similar convictions. See, e.g., State v. Crawford, 128 Wn. App. 376, 115 P.3d 387 (2005), review granted, 156 Wn.2d 1023 (2006) (a person needs to know that such a sentence is possible when deciding how intensively to investigate, when deciding how intensively to plea bargain, and when deciding whether trial or plea is the better alternative"). Here, where the pleas were Alford pleas, the knowledge that the plea is to a strike crime is even more significant to the kind of cost-benefit analysis a person entering such a plea undertakes. The prior convictions in this case were invalid on their face, and this Court should so hold and should reverse.

7. APPELLANT'S RIGHTS TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT WERE VIOLATED

As noted above, the courts have described a "prior conviction" exception to the Blakely requirements and the rights to trial by jury and proof beyond a reasonable doubt. Blakely, 542 U.S. at 303-305; Apprendi, 500 U.S. at 476-77. In the past, a majority in this State's Supreme Court held that it was proper to submit the question of whether a defendant was a persistent offender and must receive a sentence of life without the possibility of parole to a judge and prove that status by a preponderance of the evidence, not beyond a reasonable doubt. See Thorne, supra; Manussier, supra; Rivers, supra. Although those cases were decided before Blakely, since Blakely the Washington Supreme Court has reaffirmed those holdings by refusing to apply Blakely to POAA proceedings unless and until the U.S. Supreme Court does so. Wheeler, supra, Smith, supra.

Neither Wheeler nor Smith, however, retains its currency, given subsequent developments in the law. Both cases relied upon the belief that there was a "prior conviction" exception to the rights of trial by jury and proof beyond a reasonable doubt created by Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). Wheeler, 145 Wn.2d at 123; Smith, 150 Wn.2d at 141-43. In fact, Almendarez-Torres did not even *involve* those rights. In Almendarez-Torres, the question was whether the status of being a "recidivist" was an element of the substantive crime which therefore needed to be pled in the information in order to give the constitutionally mandated notice. 523 U.S. at 246. Indeed, the U.S. Supreme

Court itself has noted that Almendarez-Torres dealt with the notice question and *not* with the issue of the "Sixth Amendment right to a jury trial." Jones, 526 U.S. at 248-49.

Thus, contrary to the declarations in Wheeler and Smith, Almendarez-Torres did not create a "prior conviction" exception to the rights to trial by jury and proof beyond a reasonable doubt. The Washington Supreme Court's devotion to the "prior conviction" exception as a mandate of federal constitutional law under Almendarez-Torres is thus misplaced, as Almendarez-Torres did not create such an exception for the rights to trial by jury and proof beyond a reasonable doubt.

Further, there is very good reason to doubt the continued validity of the holding of Almendarez-Torres even if its ruling on prior convictions was applicable here. The bare majority which joined in the Almendarez-Torres decision included Justice Thomas, and the soon-retiring Justice O'Connor. See 523 U.S. at 225-26. Justice Thomas has himself recently noted that the holding which he supported in Almendarez-Torres " has been eroded by this Court's subsequent jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided." Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring in part and dissenting in part). The ruling of Almendarez-Torres was "flawed," and the justice lamented the "[i]nnumerable criminal defendants" who "have been unconstitutionally sentenced" based on that case. 125 S. Ct. at 1264. He urged the Court to "consider Almendarez-Torres' continuing viability" in an "appropriate" case. Id.

Thus, it is clear that the holding of Almendarez-Torres would be

different today. And it is clear that there has been "erosion" of the rule that case set forth. Even a brief examination of that erosion reveals how little of the foundation of Almendarez-Torres remains. For example, in Almendarez-Torres, the majority relied on the legislative intent for passing the relevant recidivist statute. 523 U.S. at 235. But in Blakely and Apprendi, the Supreme Court made it clear that the legislative intent is irrelevant in determining whether there is a Sixth Amendment or due process violation. See Blakely, supra; Apprendi, 530 U.S. at 476.

Similarly, in Almendarez-Torres, the Court relied on the belief that sentencing factors were not "elements" increasing a sentence, so that the placement of the enhancement within the sentencing code was effectively dispositive. 523 U.S. at 228, 234-35. But in Blakely the Court rejected that same theory, and held that, regardless of placement in the sentencing code, sentencing "factors" could still be subject to the requirements of proof beyond a reasonable doubt, to a jury. 124 S. Ct. at 2535-37.

In addition, in Almendarez-Torres, the fact of prior convictions only triggered an increase in the maximum sentence the sentencing court could consider, but still left discretion with the sentencing court to sentence below that maximum. 523 U.S. at 245-46. The Court relied on the "statute's broad permissible sentencing range" even after application of the enhancement and found there was not "significantly greater unfairness," because the judges still had discretion within a broad range. 523 U.S. at 245-46. Here, in stark contrast, the prior convictions mandate a sentence which the judge has no discretion to affect - life without the possibility of parole.

Thus, Almendarez-Torres did not hold that a prior conviction need not

be proven to a jury beyond a reasonable doubt under a "prior conviction" exception to those rights. It held only that a prior conviction need not be charged. The Apprendi citation to Almendarez-Torres as establishing a "prior conviction" exception so that any fact "[o]ther than a prior conviction" which increased the penalty for the crime had to be proven to a jury beyond a reasonable doubt, was not only dicta but also incorrect. It was not rendered less so when parroted in Blakely, again as dicta. And the reasoning supporting Almendarez-Torres has been so significantly eroded or is so inapplicable to the situation in this case that continuing to follow Wheeler and Smith in their erroneous reliance on Almendarez-Torres is simply error. This Court should decline to follow Wheeler and Smith and should hold, consistent with Apprendi, Ring and Blakely, that Mr. Lewis state and federal constitutional rights to trial by jury and proof beyond a reasonable doubt were violated by imposition of the POAA sentence in this case.

E. CONCLUSION

For the reasons stated herein, this Court should reverse. Cl. 22nd

DATED this 22nd day of August, 2006.

Respectfully submitted,

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State ~~of Washington~~, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;

to Mr. Robert E. Lewis, DOC # 720191, 8 wing, tier D, cell 14-2, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 22nd day of August, 2006. 11:26 am

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

The verbatim report of proceedings in this case consists of 13 volumes, which will be referred to as follows:

December 1, 2004 - "1RP;"
December 6, 2004 - "2RP;"
December 7, 2004 - "3RP;"
December 8, 2004 - "4RP;"
December 9, 2004 - "5RP;"
June 2, 2005 - "6RP;"and
the 7 chronologically paginated volumes containing the trial and sentencing, as "RP."

APPENDIX A

(damage in original copy from county)

EX 1

FILED
JAN 24 1994
PIERCE COUNTY, WASHINGTON
FED RUTT COUNTY CLERK
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. ROBERT EDWARD LEWIS, Defendant.	CAUSE NO. 94-1-00343-9 INFORMATION

DOB: 6-19-73 A/M
SS#: 537-88-2502 SID#: WA1498027 DOL#: UNK

I, JOHN W. LADENBURG, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse ROBERT EDWARD LEWIS of the crime of ASSAULT IN THE FIRST DEGREE, committed as follows:

That ROBERT EDWARD LEWIS, or an accomplice, in Pierce County, Washington, on or about the 23rd day of January, 1994, did unlawfully and feloniously with intent to inflict great bodily harm, assault Gary Withrow and inflict great bodily harm, contrary to RCW 9A.36.011(1)(c), and against the peace and dignity of the State of Washington.

DATED this 24th day of January, 1994.

City Case
WA02703

JOHN W. LADENBURG
Prosecuting Attorney in and for
said County and State.

By: Kevin S. Benton
KEVIN S. BENTON
Deputy Prosecuting Attorney
WSB #16891

ORIGINAL

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

NO. 94-1-00343-9

AFFIDAVIT FOR DETERMINATION

OF PROBABLE CAUSE

STATE OF WASHINGTON)
)ss
County of Pierce)

KEVIN S. BENTON, being first duly sworn on oath, deposes and says:

That he is a deputy prosecuting attorney for Pierce County and is familiar with the police report and/or investigation conducted by the Tacoma Police Department, case number 94-023-0471;

That this case contains the following upon which this motion for the determination of probable cause is made:

That in Pierce County, Washington, on or about the 23rd day of January, 1994, the defendant, ROBERT EDWARD LEWIS, did commit the crime of Assault In The First Degree. Witnesses observed two individuals approach the home of Gary Withrow. Later, an off duty police officer who lives next door to the victim was contacted by the victims landlady. When the officer went to investigate he found that Gary Withrow had been shot in the leg. Medical aid was contacted. Gary Withrow told officers that "Bobby" was involved. Officers were able to contact the defendant. The defendant told officers that he and "Marshall" had gone to Withrows house. The defendant further told officers that when they spoke with the victim, the victim had a stick. Further, that "Marshall" had a shotgun and during the argument Marshall shot Withrow. Withrow told officers that he knows the defendant, but does not know the individual who shot him. Withrow further told officers that the two people came to his door, that the defendant sprayed him with chemical mace, and that the other individual shot him. Responding officers noted a strong smell of what they recognized as chemical mace spray. Withrow was treated at Tacoma General Hospital, then evacuated to Harborview Medical Center. Withrow is now in stable condition, but medical personnel have

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930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

MAR 23 1994

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT EDWARD LEWIS,

Defendant.

CAUSE NO. 94-1-00343-9

AMENDED INFORMATION

I, JOHN W. LADENBURG, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse ROBERT EDWARD LEWIS of the crime of ASSAULT IN THE SECOND DEGREE, committed as follows:

That ROBERT EDWARD LEWIS, OR AN ACCOMPLICE, in Pierce County, Washington, on or about the 23rd day of January, 1994, did unlawfully and feloniously assault Gary Withrow with a deadly weapon, to-wit: a shotgun, contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

DATED this 22nd day of March, 1994.

JOHN W. LADENBURG
Prosecuting Attorney in and for
said County and State.

mj

By: _____
CATHERINE M. WHITTED
Deputy Prosecuting Attorney
WSB #17028

ORIGINAL

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

indicated that the leg may be lost due the injury. Officers located "Marshall's" vehicle, which contained a shotgun. Officers are currently looking for the other suspect.

Kevin S. Benton

Acknowledged and sworn to before me this 24th day of January, 1994.

Michelle Jones

Notary Public in and for the State of Washington, residing at Tacoma
Commission Expires: 1-10-97

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

1994 117 0234

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

vs.

NO. 94-1-00343-9

STATEMENT OF DEFENDANT ON PLEA OF GUILTY

PN

Robert E. Lewis,

Defendant.

FIL
CRIMIN
IN OPEN
MAR 2
TED
BY
DEP

MAR 23 1994

1. My true name is Robert E. Lewis

2. My age is 20.

3. I went through the 11th grade.

4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:
I have the right to be represented by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is Raymond H. Thoenig

5. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

(a) The right to a speedy trial and public trial by an impartial jury in the county where the crime is alleged to have been committed;

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself;

(c) The right at trial to hear and question the witnesses who testify against me;

(d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) I am presumed innocent until the charge is proven beyond a reasonable doubt or I enter a plea of guilty.

(f) The right to appeal a determination of guilt after a trial.

6. I am charged with the following: Assault in the Second Degree

Count I

Elements: in Pierce County, Wa. on 1/23/94 defendant assaulted Gary Witherow with a Shotgun

imum Penalty 10/20,000 Standard Range 12 + 14 months

Count II

Elements:

Maximum Penalty 10 Standard Range

Count III

Elements:

Maximum Penalty Standard Range

7. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) The standard sentencing range is based on the crime I am pleading guilty to and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes juvenile court convictions as follows: convictions for sex offenses, any class A juvenile felony only if I was 15 or older at the time the juvenile offense was committed, any class B and C juvenile felony convictions only if I was 15 or older at the time the juvenile offense was committed and I was less than 23 years old when I committed the crime to which I am now pleading guilty.

(b) The prosecuting attorney's statement of my criminal history for sentencing is as follows:

AH Assault 2° Juvenile 7/20/90

Unless I attach a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced I am obligated to tell the sentencing judge about those convictions.

(c) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this crime is binding on me. I cannot change my mind even if additional criminal history is discovered and even though the standard sentencing range and the prosecuting attorney's recommendation increase.

(d) In addition to sentencing me to confinement within the standard range, the judge will order me to pay $100 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration up to $50 per day. Furthermore, the judge may place me on community supervision, impose restrictions on my activities, and order me to perform community service.

(e) The prosecuting attorney will make the following recommendations to the judge:

High end, 14 months DOC;
Credit 59 days served
$100 CVPA; $110 costs; $100 DNA Recovp
Restitution joint + Several w/marshall Sabben
12 mos comm Placement
(Defendant waives st to be present at Rest Hrg. R.E.L

[ ] The prosecuting attorney will make the recommendations set forth in the plea agreement which is incorporated herein by reference.

(f) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard sentencing range unless the judge finds substantial and compelling reasons not to do so. If the judge goes above or below the standard sentence range, either I or the State can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence.

(g) I understand that if I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

8. IF ANY OF THE FOLLOWING BOXED PARAGRAPHS DO NOT APPLY THEY SHOULD BE STRICKEN AND INITIALED BY THE DEFENDANT AND THE JUDGE.

(a) The judge may sentence me as a first time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030(20). This sentence could include as much as 90 days' confinement plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training, and to maintain law abiding behavior.

(b) I am being sentenced for two or more violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts _____ and _____ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.

(c) The crime of _____ has a mandatory minimum sentence of at least _____ years of total confinement. The law does not allow any reduction of this sentence.

(d)	This plea of guilty will result in revocation of my privilege to drive. If I have a driver's license, I must now surrender it to the judge.	
(e)	In addition to confinement, the judge will sentence me to community placement for at least one year. During the period of community placement I will be under the supervision of the Department of Corrections and I will have restrictions placed on my activities.	
(f)	Because this crime involves a sex offense or a violent offense, I will be required to provide a sample of my blood for purposes of DNA identification analysis.	
(g)	Because this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (AIDS) virus.	
(h)	Because this crime involves a sex offense, I will be required to register with the sheriff of the county of the state of Washington where I reside. I must register immediately upon being sentenced unless I am in custody, in which case I must register within 24 hours of my release. If I leave this state following my sentencing or release from custody but later move back to Washington, I must register within 30 days after moving to this state or within 24 hours after doing so if I am under the jurisdiction of this state's Department of Corrections. If I change my residence within a county, I must send written notice of my change of residence to the sheriff within 10 days of establishing my new residence. If I change my residence to a new county within this state, I must register with the sheriff of the new county and notify the sheriff of the county where I last registered, both within 10 days of establishing my new residence.	

9. I plead guilty to the crime(s) of Assault in the Second Degree as charged in the Amended information. I have received a copy of the information.

10. I make this plea freely and voluntarily.

11. No one has threatened any harm to me or to any other person to cause me to enter this plea.

12. No person has made any promises of any kind to cause me to enter this plea except as set forth in this statement.

13. The judge has asked me to state briefly in my own words what I did that makes me guilty of this crime. This is my statement:

In Pierce County, Wa. on 1/23/94 ✓ was present when Marshall Fabian assaulted Gary Withrow with a shot gun. ✓ am pleading guilty to take advantage of the plea agreement

T R E L

Newton

1994 JAN 0258

14. Pursuant to RCW 10.73.090 and 10.73.100, I understand that my right to file any kind of post sentence challenge to the conviction or the sentence may be limited to one year.
15. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask of the judge.

Robert E Lewis
Defendant

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands this statement.

Attorney for Defendant

Deputy Prosecuting Attorney

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that:

[ ] (a) The defendant had previously read; or

[X] (b) The defendant's lawyer had previously read to him or her; or

[ ] (c) An interpreter had previously read the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

DATED: 3/23/94

Judge

*I am a certified interpreter or have been found otherwise qualified by the court to interpret in the _____ language which the defendant understands, and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this_____day of_____,19_____.

Interpreter

FILED
CRIMINAL DIV. 1
IN OPEN COURT
MAR 23 1994
TED RUTT, CLERK
BY _____ DEPUTY

Z-2466-5

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT EDWARD LEWIS,

Defendant.

NO. 94-1-00343-9

MAR 23 1994

WARRANT OF COMMITMENT

1) [ ] County Jail
2) [X] Department of Corrections
3) [ ] Other - Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: 591-7400

94-1-00343-9

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 3/23/94

By direction of the Honorable

JUDGE TED RUTT

CLERK

By: Sandy Duppa
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date MAR 23 1994 By Sandy Duppa Deputy

FILED
CRIMINAL DIV
IN OPEN COUR
MAR 23 1994
TED RUTT, Clerk
By DEPUTY

STATE OF WASHINGTON, County of Pierce
ss: I, Ted Rutt, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, 19___.

TED RUTT, Clerk
By: _____ Deputy

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: 591-7400

1994 117 0057

FILED
CRIMINAL DIV. 1
IN OPEN COURT
MAR 23 1994
TED RUTT, Clerk
By DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT EDWARD LEWIS,

Defendant.

DOB: 6/19/73
SID NO.: WA14908027
LOCAL ID:

CAUSE NO. 94-1-00343-9

MAR 23 1994

JUDGMENT AND SENTENCE
(FELONY)

WALDO F. STONE

I. HEARING

1.1 A sentencing hearing in this case was held on 3-23-94,

1.2 The defendant, the defendant's lawyer, RAYMOND THOENIG, and the deputy prosecuting attorney, CATHERINE M. WHITTED, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSES(S): The defendant was found guilty on March 23rd, 1994 by

[X] plea [ ] jury-verdict [ ] bench trial of:

Count No.:	I
Crime:	ASSAULT IN THE SECOND DEGREE
RCW:	9A.36.021(1)(c)
Date of Crime:	1/23/94
Incident No.:	94 023 0471

[ ] Additional current offenses are attached in Appendix 2.1.
[ ] A special verdict/finding for use of deadly weapon was returned on Count(s).
[ ] A special verdict/finding of sexual motivation was returned on Count(s).

ENTERED
JUDGMENT #

94-9-02433-8

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94-1-00343-9

[ ] A special verdict/finding of a RCW 69.50.401(a) violation in a school bus, public transit vehicle, public park, public transit shelter or within 1000 feet of a school bus route stop or the perimeter of a school grounds (RCW 69.50.435).
[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Date of Crime	Crime Type
ATT. ASLT 2	7/20/90	JUVI	6/12/90	V

[ ] Additional criminal history is attached in Appendix 2.2.
[ ] Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(11)):

2.3 SENTENCING DATA:

	Offender Score	Seriousness Level	Range Months	Maximum Years
Count No. I:	2	IV	12+/14 mos	10yrs/$20,000
Count No. :				
Count No. :				

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

[ ] Substantial and compelling reasons exist which justify a sentence [ ] above [ ] below the standard range for Count(s)___. Findings of fact and conclusions of law are attached in Appendix 2.4.

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2.5 RESTITUTION:

[ ] Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.
[X] Restitution should be ordered. A hearing is set for 5/5/94.
[ ] Extraordinary circumstances exist that make restitution inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.

2.6 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

[ ] no legal financial obligations.
[X] the following legal financial obligations:

[X] crime victim's compensation fees.
[X] court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
[ ] county or interlocal drug funds.
[X] court appointed attorney's fees and cost of defense.
[ ] fines.
[ ] other financial obligations assessed as a result of the felony conviction.

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

2.7 SPECIAL FINDINGS PURSUANT TO RCW 9.94A.120:

[ ] The defendant is a first time offender (RCW 9.94A.030(20)) who shall be sentenced under the waiver of the presumptive sentence range pursuant to RCW 9.94A.120(5).
[ ] The defendant is a sex offender who is eligible for the special sentencing alternative under RCW 9.94A.120(7)(a). The court has determined, pursuant to RCW 9.94A.120(7)(a)(ii), that the special sex

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946 County-City Building
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offender sentencing alternative is appropriate.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The court DISMISSES.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

$_____, Restitution to:

_____

_____

_____

$ 110.00, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);

$ 100.00, Victim assessment;

$_____, Fine; [ ] VUCSA additional fine waived due to indigency (RCW 69.50.430);

$ 100.00, Fees for court appointed attorney;

$_____, Drug enforcement fund of _____;

$_____, Other costs for: _____;

$ 310.00, TOTAL legal financial obligations [ ] including restitution [ ] not including restitution.

Payments shall not be less than $_____ per month. Payments shall commence on DOC

[ ] Restitution ordered above shall be paid jointly and severally with:

Name	Cause Number

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: 591-7400

_____ _____

_____ _____

The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release or by _____.

[ ] Bond is hereby exonerated.

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946 County-City Building
Tacoma, Washington 98402-2171
Telephone: 591-7400

94-1-00343-9

4.2 CONFINEMENT OVER ONE YEAR: The court imposes the following sentence:

(a) CONFINEMENT: Defendant is sentenced to following term of total confinement in the custody of the Department of Corrections commencing _____.

13 months on Count No. I [ ] concurrent [ ] consecutive
_____ months on Count No. _____ [ ] concurrent [ ] consecutive
_____ months on Count No. _____ [ ] concurrent [ ] consecutive

[ ] Actual number of days of total confinement ordered is: _____

[ ] This sentence shall be [ ] concurrent [ ] consecutive with the sentence in _____;

[✓] Credit is given for 59 days served;

(b) [X] COMMUNITY PLACEMENT (RCW 9.94A.120(8)(b)). The defendant is sentenced to community placement for [X] one year [ ] two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer. The terms of community placement shall include the following conditions:

(i) The defendant shall report to and be available for contact with the assigned community corrections officer as directed.
(ii) The defendant shall work at Department of Corrections-approved education, employment and/or community service.
(iii) The defendant shall not consume controlled substances except pursuant to lawfully issued prescriptions.
(iv) The defendant shall not unlawfully possess controlled substances while in community custody.
(v) The defendant shall pay supervision fees as determined by the Department of Corrections.

[ ] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:

_____

_____

_____

_____

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Telephone: 591-7400

94-1-00343-9

(c) [ ] HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)

(d) [ ] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department of Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754)

[ ] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF THIS OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND REINCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 24 HOURS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: 3/23/94

JUDGE

Presented by:

Deputy Prosecuting Attorney
WSB # 17028

Approved as to form:

Lawyer for Defendant
WSB # 6570

FILED
CRIMINAL DIV. 1
IN OPEN COURT
MAR 23 1994
TED RUTT, Clerk
By DEPUTY

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171

1994 1117 0454

FILED
CRIMINAL DIV. 1
IN OPEN COURT
MAR 23 1994
TED RUTT, Clerk
BY DEPUTY

FINGERPRINTS

Right Hand - 4 - fingers
Fingerprint(s) of: ROBERT EDWARD LEWIS, Cause #94-1-00343-9

Attested by: TED RUTT
~~COUNTY CLERK~~ CLERK
By: DEPUTY CLERK Rachel O'Rourke Date: 3/23/1994
R. O'ROURKE
Deputy Clerk

CERTIFICATE

I, _____
Clerk of this Court, certify that the above is a true copy of the Judgment and Sentence in this action on record in my office.

Dated: _____

_____
CLERK

By: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

State I.D. #

Date of Birth 6/19/73

Sex MALE

Race WHITE

ORI _____

OCA _____

OIN _____

DOA _____

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Tacoma, Washington 98402-2171
Telephone: 591-7400

APPENDIX B

(damage in original copy from county)

EX 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

APR 20 1995

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT EDWARD LEWIS,

Defendant.

CAUSE NO. 95-1-01917-1

INFORMATION

FILED
IN COUNTY CLERK'S OFFICE
A.M. APR 20 1995 P.M.
PIERCE COUNTY, WASHINGTON
TED RUTT, COUNTY CLERK
BY _____ DEPUTY

DOB: 6/19/73 A/M
SS#: 537-88-2502 SID#: WA14908027 DOL#:

CO-DEF: JAMES HARRIS HAMBURG 95-1-01918-0
RONALD WEBB KIRTLAND 95-1-01916-3

I, JOHN W. LADENBURG, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse ROBERT EDWARD LEWIS of the crime of KIDNAPPING IN THE FIRST DEGREE, committed as follows:

That ROBERT EDWARD LEWIS, in Pierce County, Washington, on or about the 19th day of April, 1995, did unlawfully and feloniously with intent to hold Trevor Davis for ransom and reward, intentionally abduct such person, contrary to RCW 9A.40.020(1)(a), and against the peace and dignity of the State of Washington.

ORIGINAL

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office (206) 591-7400

AND IN THE ALTERNATIVE

I, JOHN W. LADENBURG, Prosecuting Attorney aforesaid, do accuse ROBERT EDWARD LEWIS of the crime of KIDNAPPING IN THE FIRST DEGREE, committed as follows:

That ROBERT EDWARD LEWIS, in Pierce County, Washington, on or about the 19th day of April, 1995, did unlawfully and feloniously with intent to inflict bodily injury on Trevor Davis, intentionally abduct such person, contrary to RCW 9A.40.020(1)(c), and against the peace and dignity of the State of Washington.

DATED this 20th day of April, 1995.

City Case
WA02703

mj

JOHN W. LADENBURG
Prosecuting Attorney in and for
said County and State.

By: _____
DOUGLAS J. HILL
Deputy Prosecuting Attorney
WSB #11850

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office (206)

NO. 95-1-01917-1

AFFIDAVIT FOR DETERMINATION OF PROBABLE CAUSE

STATE OF WASHINGTON)
) ss
County of Pierce)

Douglas J. Hill, being first duly sworn on oath, deposes and says:

That he is a deputy prosecuting attorney for Pierce County and is familiar with the police report and/or investigation conducted by the Tacoma Police Department, case number 95-1090263;

That this case contains the following upon which this motion for the determination of probable cause is made:

That in Pierce County, Washington, on or about the 19th day of April, 1995, the defendants Robert E. Lewis, James H.Hamburg and Ronald W. Kirtland did go to a house located at 3908 N. Baltimore Tacoma Wa where they met up with the victim Trevor Davis. Lewis took out a handgun and pointed it at victim Davis and ordered him to the floor. A woman who was present, Chris, came in and yelled at all of them to leave and Lewis pointed the gun at her and threatened to shoot her. Lewis ordered victim Davis to get up and all three defendants got into a car with the victim being held at gunpoint. They then switched cars getting into Kirtland's car and Kirtland drove them all up to Federal Way. Along the way Lewis beat victim Davis in the head with the gun and was told to keep beating the victim because the victim was still conscious. Once in Federal Way telephone calls were made by the victim and/or defendants to Chris demanding money for the victim's return. During part of the phone calling Kirtland assisted by holding the gun on the victim. Chris and another person who was present at the time of the kidnapping advised TPD who in turn advised Federal Way law enforcement officials who in turn stopped Kirland's vehicle which contained the three defendants, the victim and the gun. The gun was loaded and with a round in the chamber. The victim was taken to the hospital for the treatment of his injuries where he made a statement

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Main Office: (206) 591-7400

to the police. State gives notice of intent to add a Deadly Weapon Sentence Enhancement and an additional count of Assault in the Second Degree.

Acknowledged and sworn to before me this 20th day of April, 1995.

Notary Public in and for the State of Washington, residing at Tacoma
Commission Expires: 1-10-97

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

1995 1322 1381

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

FILED
ORIGINAL DIV. 1
IN OPEN COURT
JUN 12 1995
TED RUTT, Clerk
BY [illegible]
DEPUTY

THE STATE OF WASHINGTON,

Plaintiff,

vs.

Robert E. Lewis,

Defendant.

NO. 95-1-01917-1

STATEMENT OF DEFENDANT ON PLEA OF GUILTY

PN _____

JUN 12 1995

1. My true name is Robert E. Lewis.
2. My age is 21.
3. I went through the 11th grade. Can't read
4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:
I have the right to be represented by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is Standby Atty Stoller.

5. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

(a) The right to a speedy trial and public trial by an impartial jury in the county where the crime is alleged to have been committed;

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself;

(c) The right at trial to hear and question the witnesses who testify against me;

(d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) I am presumed innocent until the charge is proven beyond a reasonable doubt or I enter a plea of guilty.

(f) The right to appeal a determination of guilt after a trial.

6. I am charged with the following: Kidnap 1°

Count I In Pierce County on 4/19/95 did feloniously

Elements: with intent to hold Trevor Davis for ransom

& reward, intentionally abduct such person

Maximum Penalty 20 to life, $50,000 Standard Range 72 [redacted] mo to [redacted] 96 mo

Z-2466-1

Count II

Elements:

Maximum Penalty Standard Range

Count III

Elements:

Maximum Penalty Standard Range

7. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) The standard sentencing range is based on the crime I am pleading guilty to and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes juvenile court convictions as follows: convictions for sex offenses, any class A juvenile felony only if I was 15 or older at the time the juvenile offense was committed, any class B and C juvenile felony convictions only if I was 15 or older at the time the juvenile offense was committed and I was less than 23 years old when I committed the crime to which I am now pleading guilty.

(b) The prosecuting attorney's statement of my criminal history for sentencing is as follows:

3-23-94 Assault 2° Adult ✓

7-20-90 A.H. Assault 2° Juvenile ✓

Unless I attach a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced I am obligated to tell the sentencing judge about those convictions.

(c) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this crime is binding on me. I cannot change my mind even if additional criminal history is discovered and even though the standard sentencing range and the prosecuting attorney's recommendation increase.

(d) In addition to sentencing me to confinement within the standard range, the judge will order me to pay $100 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration up to $50 per day. Furthermore, the judge may place me on community supervision, impose restrictions on my activities, and order me to perform community service.

(e) The prosecuting attorney will make the following recommendations to the judge:

72 [redacted] mo. credit for 54 days served (low end of range) 110 costs, 100 CVPA, restitution joint & several co-defendants by later order of court, fine in the discretion of the court, 24 mo com. placement concurrent w/ com. placement in Yelm

[ ] The prosecuting attorney will make the recommendations set forth in the plea agreement which is incorporated herein by reference.

(f) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard sentencing range unless the judge finds substantial and compelling reasons not to do so. If the judge goes above or below the standard sentence range, either I or the State can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence.

(g) I understand that if I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

8. IF ANY OF THE FOLLOWING BOXED PARAGRAPHS DO NOT APPLY THEY SHOULD BE STRICKEN AND INITIALED BY THE DEFENDANT AND THE JUDGE.

(a) The judge may sentence me as a first time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030(20). This sentence could include as much as 90 days' confinement plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training, and to maintain law abiding behavior.	
(b) I am being sentenced for two or more violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts _____ and _____ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.	
(c) The crime of _____ has a mandatory minimum sentence of at least _____ years of total confinement. The law does not allow any reduction of this sentence.	

(d)	This plea of guilty will result in revocation of my privilege to drive. If I have a driver's license, I must now surrender it to the judge.	
(e)	In addition to confinement, the judge will sentence me to community placement for at least one year. During the period of community placement I will be under the supervision of the Department of Corrections and I will have restrictions placed on my activities.	
(f)	Because this crime involves a sex offense or a violent offense, I will be required to provide a sample of my blood for purposes of DNA identification analysis.	
(g)	Because this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (AIDS) virus.	
(h)	Because this crime involves a sex offense, I will be required to register with the sheriff of the county of the state of Washington where I reside. I must register immediately upon being sentenced unless I am in custody, in which case I must register within 24 hours of my release. If I leave this state following my sentencing or release from custody but later move back to Washington, I must register within 30 days after moving to this state or within 24 hours after doing so if I am under the jurisdiction of this state's Department of Corrections. If I change my residence within a county, I must send written notice of my change of residence to the sheriff within 10 days of establishing my new residence. If I change my residence to a new county within this state, I must register with the sheriff of the new county and notify the sheriff of the county where I last registered, both within 10 days of establishing my new residence.	

9. I plead guilty to the crime(s) of Kidnap 1°

as charged in the Original information. I have received a copy of the information.

10. I make this plea freely and voluntarily.

11. No one has threatened any harm to me or to any other person to cause me to enter this plea.

12. No person has made any promises of any kind to cause me to enter this plea except as set forth in this statement.

13. The judge has asked me to state briefly in my own words what I did that makes me guilty of this crime. This is my statement:

I am pleading guilty to take advantage of a negotiated plea agreement & because a reasonable person might find me guilty based on the states evidence. Robert E. Lewis

14. Pursuant to RCW 10.73.090 and 10.73.100, I understand that my right to file any kind of post sentence challenge to the conviction or the sentence may be limited to one year.
15. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask of the judge.

Robert E Lewis
Defendant

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands this statement.

Gordon K Murtha 12937
Attorney for Defendant

Deputy Prosecuting Attorney 11570

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that:

[ ] (a) The defendant had previously read; or

[ ] (b) The defendant's lawyer had previously read to him or her; or

[ ] (c) An interpreter had previously read the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

DATED: 6-12-95

Judge

*I am a certified interpreter or have been found otherwise qualified by the court to interpret in the _____ language which the defendant understands, and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this _____ day of _____, 19____.

Interpreter

FILED
CRIMINAL DIV. 1
IN OPEN COURT
JUN 12 1995
TED BUTT, Clerk
By _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT EDWARD LEWIS,

Defendant.

CAUSE NO. 95-1-01917-1

WARRANT OF COMMITMENT

1) [ ] County Jail
2) [X] Dept. of Corrections
3) [ ] Other - Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

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Tacoma, Washington 98402-2171
Telephone: 591-7400

95-1-01917-1

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 6-12-95

By direction of the Honorable

JUDGE

TED RUTT
CLERK

By: Sandy Dyppa
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF
Date JUN 12 1995 By Sandy Dyppa Deputy

FILED
JUN 12 1995
DEPUTY

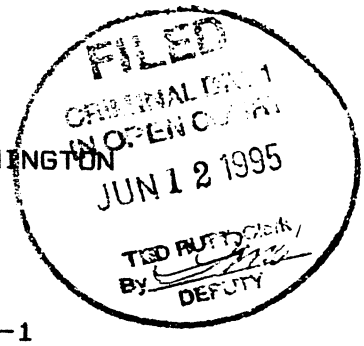
STATE OF WASHINGTON, County of Pierce ss: I, Ted Rutt, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, 19___.

TED RUTT, Clerk
By: _____ Deputy

84 months DOC with credit for 54 days served

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: 591-7400

1995 1322 1510



JUN 12 1995

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. ROBERT EDWARD LEWIS, Defendant. DOB: 6/19/73 SID NO.: WA14908027 LOCAL ID:	CAUSE NO. 95-1-01917-1 JUDGMENT AND SENTENCE (FELONY) THOMAS J. FELNAGLE

I. HEARING

1.1 A sentencing hearing in this case was held on 6-12-95.

1.2 The defendant, the defendant's lawyer, SANDRA MOSTOLLER, and the deputy prosecuting attorney, DOUGLAS J. HILL, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSES(S): The defendant was found guilty on June 12, 1995 by

[X] plea [ ] jury-verdict [ ] bench trial of:

Count No.:	I
Crime:	KIDNAPPING IN THE FIRST DEGREE, Charge Code: (F1/F3)
RCW:	9A.40.020(1)(a), 9A.40.020(1)(c)
Date of Crime:	4/19/95
Incident No.:	TPD 95 109 0263

[ ] Additional current offenses are attached in Appendix 2.1.
[ ] A special verdict/finding for use of deadly weapon was returned on Count(s).
[ ] A special verdict/finding of sexual motivation was returned on Count(s).

WITNESS LIST Page 4 of ENTERED

95-9-05442-1

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[ ] A special verdict/finding of a RCW 69.50.401(a) violation in a school bus, public transit vehicle, public park, public transit shelter or within 1000 feet of a school bus route stop or the perimeter of a school grounds (RCW 69.50.435).

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Date of Crime	Crime Type
ATT. ASLT 2	7/20/90	JUVI	6/12/90	V
ASLT 2	3/23/94	ADULT	1/23/94	V

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(11)):

2.3 SENTENCING DATA:

	Offender Score	Seriousness Level	Range Months	Maximum Years
Count No. I:	4	X	72-96 mos	20 - LIFE

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

[ ] Substantial and compelling reasons exist which justify a sentence [ ] above [ ] below the standard range for Count(s)___. Findings of fact and conclusions of law are attached in Appendix 2.4.

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2.5 RESTITUTION:

[ ] Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.
[X] Restitution should be ordered. A hearing is set for 3.26.95.
[ ] Extraordinary circumstances exist that make restitution inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.

2.6 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

[ ] no legal financial obligations.
[X] the following legal financial obligations:

[X] crime victim's compensation fees.
[X] court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
[ ] county or interlocal drug funds.
[ ] court appointed attorney's fees and cost of defense.
[ ] fines.
[ ] other financial obligations assessed as a result of the felony conviction.

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

2.7 SPECIAL FINDINGS PURSUANT TO RCW 9.94A.120:

[ ] The defendant is a first time offender (RCW 9.94A.030(20)) who shall be sentenced under the waiver of the presumptive sentence range pursuant to RCW 9.94A.120(5).
[ ] The defendant is a sex offender who is eligible for the special sentencing alternative under RCW 9.94A.120(7)(a). The court has determined, pursuant to RCW 9.94A.120(7)(a)(ii), that the special sex offender sentencing alternative is appropriate.

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Tacoma, Washington 98402-2171

95-1-01917-1

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The court DISMISSES.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

$_____, Restitution to:

_____

_____

_____

$ 110.00, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);

$ 100.00, Victim assessment;

$_____, Fine; [ ] VUCSA additional fine waived due to indigency (RCW 69.50.430);

$_____, Fees for court appointed attorney;

$_____, Washington State Patrol Crime Lab costs;

$_____, Drug enforcement fund of _____;

$_____, Other costs for: _____;

$ 210.00, TOTAL legal financial obligations [ ] including restitution [X] not including restitution.

Payments shall not be less than $ as set by CCO per month. Payments shall commence on release from DOC

[ ] Restitution ordered above shall be paid jointly and severally with:

Name	Cause Number
Ronald Hartland	95-1-01918-0

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171

James Hamburg 95-1-01916-3

The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release or by _____.

[ ] Bond is hereby exonerated.

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171

1995 1322 1517

FILED
ORIGINAL DOCUMENT
IN OPEN COURT
JUN 12 1995
TED RUTT, County Clerk
By _____ DEPUTY

FINGERPRINTS

Right Hand - 4 fingers
Fingerprint(s) of: ROBERT EDWARD LEWIS, Cause #95-1-01917-1

Attested by: TED RUTT
COUNTY CLERK
By: DEPUTY CLERK Isabel O'Rourke CLERK Date: 6/12/1995
T. O'ROURKE
Deputy Clerk

CERTIFICATE

I, _____
Clerk of this Court, certify that the above is a true copy of the Judgment and Sentence in this action on record in my office.

Dated: _____

_____
CLERK

By: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

State I.D. #WA14908027

Date of Birth 6/19/73

Sex MALE

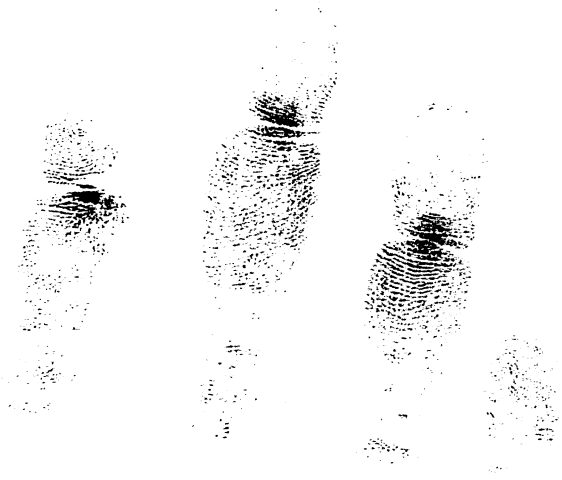
Race A

ORI _____

OCA _____

OIN _____

DOA _____



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Tacoma, Washington 98402-2171

95-1-01917-1

4.2 CONFINEMENT OVER ONE YEAR: The court imposes the following sentence:

(a) CONFINEMENT: Defendant is sentenced to following term of total confinement in the custody of the Department of Corrections commencing _____.

84 months on Count No. I [ ] concurrent [ ] consecutive
_____ months on Count No. _____ [ ] concurrent [ ] consecutive
_____ months on Count No. _____ [ ] concurrent [ ] consecutive

[ ] Actual number of days of total confinement ordered is: _____

[ ] This sentence shall be [ ] concurrent [ ] consecutive with the sentence in _____;

[X] Credit is given for 64 days served;

(b) [X] COMMUNITY PLACEMENT (RCW 9.94A.120(8)(b)). The defendant is sentenced to community placement for [ ] one year [X] two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer. The terms of community placement shall include the following conditions:

(i) The defendant shall report to and be available for contact with the assigned community corrections officer as directed.
(ii) The defendant shall work at Department of Corrections-approved education, employment and/or community service.
(iii) The defendant shall not consume controlled substances except pursuant to lawfully issued prescriptions.
(iv) The defendant shall not unlawfully possess controlled substances while in community custody.
(v) The defendant shall pay supervision fees as determined by the Department of Corrections.

[ ] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:

_____

_____

_____

_____

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(c) [ ] HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)

(d) [ ] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department of Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754)

[ ] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF THIS OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND REINCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 24 HOURS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: 6-12-95

JUDGE

THOMAS J. FELNAGLE

Presented by:

Deputy Prosecuting Attorney
WSB # 11850

Approved as to form:

Lawyer for Defendant
WSB # 12937

FILED
IN OPEN COURT
JUN 12 1995
TED BELT, Clerk
BY DEPUTY

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